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MAR 13 1944
CHAS. H. WATSON
IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 786

EDWARD M. WINSTON,

Petitioner,

VS.

THOMAS J. COURTNEY, State's At-
torney, COUNTY OF COOK, a Mun-
icipal Corporation of the State of
Illinois, and others,

Respondents.

Petition for Writ of Cer-
tiorari to the Supreme
Court of the State of
Illinois.

There heard on appeal from
the Circuit Court of Cook
County.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

WEIGHSTILL WOODS,

Attorney for Petitioner.

URBAN A. LAVERY,

E. M. WINSTON,

S. J. KONENKAMP,

Of Counsel.



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PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Your petitioner, EDWARD M. WINSTON, prays that Writ of Certiorari be issued by this Court to review the judgment below of the Supreme Court of Illinois, finally rendered November 11, 1943, affirming a judgment against your petitioner entered by the Circuit Court of Cook County in Illinois, dismissing his answer and counterclaim.

The judgment of both courts held as invalid and as of no avail a formal record contract for legal services, between your petitioner, an attorney at law, and the County of Cook, State of Illinois. Both courts thereby denied all rights of your petitioner under the said contract and held adversely to your petitioner upon certain Federal questions, based on the Constitution of the United States and hereinafter more fully set forth.

Judgment and Opinion Below.

The opinion of the Supreme Court of Illinois was first filed September 23, 1943. A Petition for Rehearing on the part of your petitioner was duly filed, but was denied by the court November 11, 1943. Another, and separate, Petition for Rehearing was duly filed by certain other defendants below (individual members of Cook County Board of Commissioners), but this Petition was "stricken," November 10, 1943, without any reason being given therefor. See detail of record at page 18ff below.

Jurisdiction in this Court.

This Petition is presented in accordance with Section 237 (as amended) of the Judicial Code (U. S. C. A., Title 28, section 344) and Rule 38 of this Court.

As already indicated, the judgment and opinion of the Supreme Court of Illinois construed certain statutes of the State of Illinois in such a way (your petitioner contends) and reversed its own ruling so as to—

- (a) Deprive your petitioner of his vested property rights without due process of law;
- (b) Deny your petitioner the equal protection of the laws of Illinois; and
- (c) Impair the obligation of your petitioner's contract with the County of Cook, State of Illinois.

And in all three of those particulars your petitioner contends that the judgment and opinion below contravened the Constitution of the United States.

The record shows that each of the Federal questions above mentioned was raised in the courts below and decided adversely to your petitioner.

Upon application to this Court the time to file this Petition for Certiorari was duly extended to March 13, 1944.

Summary Statement of Facts and Issues.

In order properly to understand this case, this Court must be rather fully advised as to the unusual background of facts out of which the case arose.

The County of Cook is the largest single county and local tax-collecting unit in the United States, since it includes not only the City of Chicago, but also a considerable area outside that city, and has a population of over 4 million people. In the years 1931 and 1932, the County (for the reasons hereinafter set forth) had actually become insolvent and was unable for many months to pay the court judges and other officials, and was unable to pay its current debts, and even defaulted on the interest on its municipal bonds. This condition had been brought about by three grave emergencies:

1. The County of Cook and the City of Chicago (like other local governments in the United States) during those years was suffering in their tax revenues from the effects of the great financial depression of that period; and as a result the County (which is the constitutional tax collecting agency for the State and all other local governments within the County, including the City of Chicago) was confronted with a cumulating amount of tax delinquencies both as to real

and personal property. These gross delinquencies by the end of the year 1930 had reached it was said more than 100 million dollars and had brought the threat of governmental disaster to the County.

2. The Legislature of the State and the State Tax Commission had previously ordered a so-called "Re-assessment" of all real estate tax valuations in the County of Cook for the year 1927; and this "Re-assessment" had itself greatly increased the temporary insolvency of the County (and all local government units within the County, including the City of Chicago), for the reason that the "Re-assessment" had taken more than 18 months longer to complete, than was contemplated or expected by the taxing authorities of the State and County; as a result of which no real estate taxes whatever were collected in the County during the period that such "Re-assessment" was being spread.

3. After this and during the years 1929 to 1932, it was (and is) a matter of common knowledge in Cook County that a so-called "tax strike" existed in the County whereby a large part of the real estate taxpayers completely refused to pay any taxes whatever until forced to do so by suits instituted for collection thereof, and the liquidation process of courts.

The record shows that as a result of these extraordinary tax conditions, the County and all of the local governments within the County (including the City of Chicago) were faced with bankruptcy; that the interest on their municipal bonds had been defaulted with the result that all of such bonds were badly depreciated on the financial markets, and the fiscal credit of the County and of each of such local governments was, for the time being, totally destroyed; while the thousands of municipal employees of the County and the other local governments were unpaid for months on end, and were for long periods of time continuously faced with what came to be known as "payless pay-days."

The record shows that the County Board of Cook County, under a special provision of the Illinois Constitution, is charged with the duty of "managing the affairs" of Cook County (Const. Art. 10, Sec. 7); and that the Statutes of Illinois make it the sole duty of the said County Board to enforce the collection of all property taxes, both real and personal, by suits in court if necessary.

The record shows that the County Board, being confronted with the severe tax emergency already indicated, decided to correct that situation as rapidly as possible and for that purpose, as already indicated, entered into a formal contract of record with your petitioner for the collection of such delinquent real estate taxes. That contract was fully considered and long debated by the County Board and was finally authorized and adopted by formal legislative action of the County Board, which incorporated the Contract therein.

In view of its prime importance in this case, this sovereign legislative action of the County (including the Contract in question) is set forth (Tr. 3 ff.) as part of State's Attorney's complaint in the trial court.

The record shows that at the time of such legislative action by the County and the making of that Contract, in the year 1931, the general legal adviser of the County of Cook was the then duly elected and acting State's Attorney of the County, the Honorable John A. Swanson (Tr. 8).

The record shows that for a period of more than 60 years prior thereto, and ever since the adoption of the Illinois Constitution of 1870, *down to the inception of this suit, in July, 1933*, it had been the custom and practice and tradition for the County Board of Cook County to secure the aid and assistance of outside counsel and at-

torneys in the collection of taxes (in addition to the State's Attorney) whenever the County Board determined that such action was in the public interest. That custom and practice had been specifically approved by at least four prior decisions of the Supreme Court of Illinois.

Acting under such custom and practice and tradition, the County Board made the Contract in question and the then State's Attorney of Cook County formally approved the legislative action of the County Board in authorizing the said Contract, and officially approved the Contract so made between the County and your petitioner (Tr. 8).

Your petitioner accepted the said Contract and proceeded to set up a large clerical and auditing force to carry out its provisions. In due course of contract period, petitioner instituted in court and pursued more than 818 separate and important real estate tax suits in the courts of the County and actually collected by force of those suits and paid over to the County treasury a total sum of delinquent taxes amounting to \$16,522,470.81.

Your petitioner particularly calls attention to the fact that the County of Cook, under the law, received (as compensation for its services and efforts of tax collection) all the so-called "penalties" collected from taxpayers, being additional sums due after default, which these suits conducted by Winston collected, over and above the taxes originally assessed. And your Petitioner also calls particular attention to the fact that his fees and compensation, under his contract, were not to be paid out of the general funds of the County, but depended entirely on and were to be paid out of such "penalties" as might be collected by him. In other words, the County itself was to make, and did make, a large profit out of the services of your peti-

tioner; and your petitioner's fees were to be paid as a relatively small part of such profit to the County.

Section 705, Chapter 120, Ill. Rev. Stats.

The record in this case shows that the books and records of the County Treasurer showed (and still show) that your petitioner actually collected the sum of \$3,546,-443.70 as "penalties" on delinquent taxes, all of which sum went into the County treasury *as profit* to the County, as a result of the contract with your petitioner.

New State's Attorney.

The record shows that in November, 1932, and about 18 months after your petitioner began work under the said contract, a new and different State's Attorney was elected in Cook County, and that he was of a different political party from his predecessor. And your petitioner charges that the record in this case shows that this case has grown entirely out of that change in the personnel of the office of State's Attorney of Cook County. The same State's Attorney who was elected in November, 1932, is still in office at the time of the filing of this Petition for Certiorari. That State's Attorney, in his own behalf and *in his own name*, began this suit in July, 1933, to have your petitioner's contract with the County declared void and of no avail and to restrain and prevent any payments whatever being made to petitioner under such contract.

All services by petitioner were performed and completed before this suit was filed.

The case has dragged through the courts for more than 10 years, and was only finally decided against your petitioner by the judgment of the Supreme Court of Illinois in the late fall of 1943, as already indicated.

During said domination by the new State's Attorney the delinquences have grown and now "there are hundreds of millions of dollars of delinquent taxes against property in Cook County." *People v. Courtney*, 380 Ill. 171 at 180.

Your petitioner urges that the Supreme Court of Illinois has denied to your petitioner his constitutional rights, as stated elsewhere in this petition. And your petitioner contends that the Supreme Court of Illinois has decided this case adversely and contrary to several of the prior and settled decisions of that court itself (as already stated) upon which earlier decisions your petitioner properly relied and the County Board properly relied, in entering into the said contract; and that thereby your petitioner became vested with certain contract rights and property rights in and to the said contract and its avails. And your petitioner therefore says that the Supreme Court of Illinois has illegally and arbitrarily changed its own well-settled construction of the Constitution of Illinois, and of applicable Statutes of Illinois in the premises; and that the said Court has illegally and arbitrarily applied its new ruling in an *ex post facto* and lawless fashion in an attempt by the Court to destroy the vested rights of your petitioner.

Federal Questions.

The major Federal questions in this case are:

A. Whether a written contract made by a County upon its public records in good faith, by authority of specific State and County legislation, between a practicing attorney and the County, providing for fees and reimbursement to the attorney for legal services and expenses paid out by him in rendering legal services in the courts for the collection of taxes on real estate, is valid and enforceable, and is protected from impairment by the Constitution of the United States.

B. Whether destruction by a State Court of such a contract is not forbidden by those provisions of the

Constitution of the United States which prohibit impairment of contracts; which prohibit *ex post facto* laws and decisions of States; which prohibit the taking of vested and established contract rights or other private property; which prohibit the taking of private property for public use, and which prohibit a State from denying to the citizen the equal protection of the law, on any grounds whatever.

The foregoing Federal questions are of such general public importance, and are particularly of such grave personal importance to your petitioner, that they should be reviewed by this Court. Particularly is that so because the said rulings made by the courts of Illinois on this record seem to be in clear conflict with decisions and rulings previously made by this Court.

Winston has not claimed and does not claim to supersede any power of the State's Attorney of Cook County. His services were rendered pursuant to legislation by the County Board and pursuant to request by John A. Swanson, State's Attorney, and pursuant to contract made of public record with the County Board. Winston agrees that the County Board had authority to terminate his services by new legislation by the County Board, which was done by proceedings dated January 16, 1933.

Prayer for Relief.

Your petitioner submits that he did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court and Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioners pray the allowance of your writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

WEIGHTSTILL WOODS,

Counsel for Petitioner.

Supporting Brief For Petitioner.

(A-1) The Constitution of Illinois vests the legislative sovereignty over the County affairs of Cook County in "The Board of County Commissioners of Cook Cuntty," by a special section of that constitution.

Section 7 of Article 10, Constitution of 1870.

(A-2) That sovereign legislative power is co-ordinate with and beyond the jurisdiction of every Court and State's Attorney and the Legislature of Illinois.

Article III, Constitution of Illinois, 1870.

Cummings v. Smith, 368 Ill. 94, 103.

Ottawa Gas Light Co. v. People, 138 Ill. 336, 343.

People v. Czarnecki, 265 Ill. 489.

Krueger v. Zender, 332 Ill. 519.

Helliwell v. Sweitzer, 278 Ill. 248.

(A-3) This Court will take judicial notice that the population of Cook County is more than four million people and more than half the population of the State of Illinois.

(A-4) By sovereign acts of legislation, which are shown by this record, the County Board of Cook County, expressly authorized the 818 civil tax litigations which were con-

ducted by petitioner Winston, in courts of record in Cook County, and also authorized said contract of employment, which was made with the express approval in writing by the then State's Attorney of Cook County.

County proceedings at pages and dates herein mention: 4/27/32 page 1207—12/5/32 page 60, 68—12/12/32 page 74

Cummings v. Smith, 368 Ill. 94, 103.

(A-5) Said contract directs and empowers Winston to perform legal services and administrative action at court. That action every attorney and counsellor-at-law is authorized by his license from the Supreme Court of Illinois, to carry on at the request of the client who has control over such litigation. The *preparation and conduct of such litigation at court for Cook County as client*, is not in any sense of the term any act of sovereignty, and does not involve any essential power vested in the State's Attorney of Cook County by the Constitution of Illinois.

Chapter 13, Section 1, Illinois Revised Statutes.
Article 6, Section 22, Constitution of Illinois 1870.
Ottawa Gas Light Co. v. People, 138 Ill. 336, 343 (1891).

Howard v. Burke, 248 Ill. 224, 228 (1910).

Wilson v. County of Marshall, 257 Ill. App. 220, 223 (1930).

People v. Straus, 266 Ill. App. 95 (1932); Affirmed by *People v. Straus*, 355 Ill. 640 (1934).

(B-1) The Statutes of Illinois *pertaining to revenue* for all taxing bodies (Chapter 120 of Illinois Revised Statutes), specifically confirm the power of the *County Board and no one else* to manage and conduct all litigation for *collection of delinquent taxes* by court proceedings.

Illinois Revised Statutes as amended June 17, 1917, Chapter 120, Sections 230, 253, 254, 156 to 161, 183, 255, 292 (See Appendix to this petition at page 39 for an example).

Ottawa Gas Light Co. v. People, 138 Ill. 336, 343.
Article III, Constitution of Illinois, 1870.

(B-2) The statute is specific that the *County Board* means "The Board of County Commissioners of Cook County," Chapter 120, Section 292.

(B-3) The County Board has control of many funds that are applicable to payment for legal services under this contract, in addition to penalties and taxes exceeding Sixteen Million Dollars, cash funds collected and paid into the County Treasurer by efforts of petitioner.

Section 705, Chapter 120, Ill. Rev. Statutes.

People v. Kawoleski, 310 Ill. 498, 501.

Tearney v. Harding, 335 Ill. 123 at 128.

(C-1) No tax statutes which name the State's Attorney as an enforcing officer were ever effective as to this case. The "State's Attorney" was named as enforcing officer in the delinquent Tax Act Laws of 1935, page 1168. All suits and acts by Winston were before that date. And that law was expressly repealed by the present Revenue Law approved May 17, 1939. The "State's' Attorney" was named as enforcing officer in the delinquent Tax Act dated July 26, 1939, at Section 6, and also in the delinquent Tax Act July 10, 1941, at Section 6, but these laws are limited to counties with a population *less than 500,000 people*; they were never applicable to Cook County.

(C-2) The State's Attorney of Cook County is referred to in the County Assessors Act, Laws of May 15, 1933, Section 46. But prior to enactment of Section 1 of act of July 24, 1943, the State's Attorney of Cook County is not

mentioned anywhere in the Revenue Act of Illinois. All suits and acts by Winston were *before* any of these dates.

(C-3) There was no common law "State's Attorney." There are no common law powers of State's Attorney. The State's Attorney provided for by the Constitution of 1870 of Illinois, was a new office. Constitution does not specify any duties of that office (Tr. 57).

Revised Statutes of Illinois 1845, Chapter 12.

Constitution of Illinois 1870, Article VI, Section 22.

(C-4) Neither the State's Attorney nor any one else has any power whatever to conduct civil litigation about *collection* of delinquent taxes, separate and apart from said specific statutes which vest in the County Board, authority to initiate and all conduct of such litigation.

People v. Biggins, 96 Ill. 481 (1880).

Ottawa Gas Light Co. v. People, 138 Ill. 336, 343 (1891).

Wilson v. County of Marshall, 257 Ill. App. 220, 223 (1930).

People v. Straus, 266 Ill. App. 95 (1932); Affirmed by *People v. Straus*, 355 Ill. 640 (1934).

(C-5) Only the County Board may authorize the office or employment of an assistant State's Attorney or Special Attorney. Only the County Board may provide compensation for such office or employment or personal service.

Dalby v. People, 124 Ill. 66 at 75.

Section 64 Fortieth, Chapter 34; Ill. Rev. Stat.

Section 18, Chapter 53, Illinois Revised Statutes.

Section 24, Article V, Constitution of Illinois.

People v. Hanson, 290 Ill. 370, 373.

Lavin v. Board of Commissioners, 245 Ill. 496, 503ff.

Tearney v. Harding, 335 Ill. 123, 127.

(D-1) The primary duty is obligatory upon all courts, both state and national, to hear and determine assertions upon the Bill of Rights and other constitutional questions and federal questions, which are presented by the record.

Article VI of the Constitution of the United States (Second Paragraph).

West Chicago Street Railway Co. v. Illinois ex rel. Chicago, 201 U. S. 506 at 519-520.

Coombes v. Getz, 285 U. S. 434.

(D-2) The orders dated September 23rd, 1943, and October 24th, 1934, as adhered to on November 11, 1943, by the Supreme Court of Illinois, are now final for purposes of review by this Court.

Georgia Ry. and Power Co. v. Decatur, 262 U. S. 432.

Central Union Telephone Company v. City of Edwardsville, 269 U. S. 190.

(D-3) Said orders are void and outlaw because they seek to destroy contract and property rights of your petitioner shown by this record to be vested before this suit was begun by Thomas J. Courtney on July 15, 1933.

People ex rel Eitel v. Lindheimer, 371 Ill. 367, 308 U. S. 505 and 636.

Home Building & Loan Association v. Blaisdell, 290 U. S. 398 at 431.

(E) By decisions of Supreme Court of Illinois, through all the decades prior to the judgment and decree now appealed from, the Constitution and Statutes as to powers

of County Board, and duties of State's Attorney as to civil litigation, have always sustained the sovereign power and legislative actions of the County Board.

These sovereign acts of legislation have provided for employment of and for payment of County Attorneys, Assistant State's Attorneys, and Special Attorneys, to attend to all manner of litigation authorized by counties in Illinois, independent of any action therein by the State's Attorney of such a County. As a contemporaneous construction, such legislation and administration is binding upon all branches of the government of Illinois.

Cook County Budget for 1931 and prior years.

Ottawa Gas and Light Co. v. People, 138 Ill. 336, 343 (1891).

County of Franklin v. Layman, 145 Ill. 138; affirming 43 Ill. App. 163.

Cook County v. Healy, 222 Ill. 310, 317ff (1906).

Howard v. Burke, 248 Ill. 224 at 228 (1910).

Galpin v. City of Chicago, 269 Ill. 27 at 41 (1915).

Tearney v. Harding, 335 Ill. 123 at 127 (1929).

People v. Straus, 266 Ill. App. 95 (1932); Affirmed by *People v. Straus*, 355 Ill. 640 (1934).

(F-1) By contemporaneous construction such legislation and administration is binding in favor of Winston, against all branches of the government of Illinois.

Cook County Budget for 1944 and all prior years.

Nye v. Foreman, 215 Ill. 285 at 288 (1905).

Howard v. Burke, 248 Ill. 224 at 228 (1910).

(F-2) And the Legislature of Illinois by Statute in 1912 and re-enactment in 1929 had reaffirmed all that court construction of statute and constitution for years before the Winston contract was made.

Section 18 of Chapter 53 and Section 129 and 179 of Chapter 46, of Illinois Revised Statutes.

(F-3 There is even stronger confirmation and independent continuous assertion by the legislature of Illinois, in its special law for appointments to office by Cook County Commissioners, enacted June 15, 1893 Revised 25, 1913, Chapter 34, Section 64, Fortieth and Forty-third. These laws were re-enacted July 21, 1941 and July 15, 1943, as Sections 64:29 and 52 of Chapter 34 (Smith-Hurd Illinois Annotated Statutes—Pocket part for 1944, page 43.) Continuously since June 15, 1893 this Illinois Statute has provided for “*the county attorney, the county architect, the committee clerk of the County Board, the county purchasing agent*” and other employees to be appointed by the County Board.

(F-4 Without need to rely upon that statute, the Supreme Court of Illinois ordered the County of Cook to pay the County Architect, as an exercise of County power and duty under Section 7 of Article 10 of Constitution of Illinois 1870.

Hall v. County of Cook, 359 Ill. 528.

(F-5) It is arbitrary denial of equal protection of law, impairment of contract, a taking of vested property by judicial act *ex post facto* without benefit of purchase by eminent domain, and a denial of due process of law, for the Supreme Court and Circuit Court of Illinois, to rule against petitioner whose position is indistinguishable from that of said County Architect.

Statement as to Jurisdiction.

The assignment of errors in the record filed before the Supreme Court of Illinois, and the petitions for rehearing in that Court, summarize the Constitutional and Federal questions presented to that Court and to the Circuit Court of Cook County. There was impairment of contract and

denial of due process of law and denial of equal application of law. Petition for rehearing was denied by the Supreme Court of Illinois on November 11, 1943. Upon an application to this Court for an extension of time to file this petition, an order was entered February 5, 1944 in this Court, extending the time until March 13, 1944. Timely application for review by this Court is made by filing this petition on or before March 13, 1944. This petition is presented in accordance with Section 237(b) of the Judicial Code as amended, and Rule 38 of this Court as amended.

Demorest v. City Bank Farmers Trust Company,
64 S. Ct. 384 at 388.

Snowdon v. Hughes, 64 S. Ct. 397 at 401.

Upon each appeal (1934 and 1943), your petitioner Winston contended before the Supreme Court of Illinois, that the law to govern this case was thoroughly settled by Constitution and by prior statutes and earlier decisions of the Supreme Court of Illinois. On the first appeal (No. 22412 taken by the State's Attorney of Cook County) the Supreme Court of Illinois said:

"A construction of the Constitution is involved, and so, regardless of argument pertaining to other elements of jurisdiction, this Court has jurisdiction, and the motion to transfer will be denied."

That Court at that time (October 24, 1934) reversed the dismissal order that had been entered against the State's Attorney suit by the Circuit Court of Cook County, and remanded the case to that Court. There being no final order at that date, this record could not then be brought to this Court for review. *Georgia Ry. and Power Co. v. Decatur*, 262 U. S. 432. Later (after remandment and further proceedings) the present appeal was taken in the year 1943 to the Supreme Court of Illinois, by your petitioner.

ARGUMENT FOR PETITIONER.

Statement of the Case.

At an election held in November 1932, Thomas J. Courtney was elected as State's Attorney for Cook County Illinois. In December 1932 (as successor to John A. Swanson) he entered upon the duties of that office. An Information in the nature of a bill in equity for injunction was filed July 22, 1933, by "Thomas J. Courtney as State's Attorney for the said County of Cook for the people of the State of Illinois, and in the name and by the authority thereof, and on the relation of himself as a resident and taxpayer of said County of Cook in behalf of himself as such taxpayer and other taxpayers of said County similarly situated." (Tr. 1.) An amended Information and thereafter a second amended Information were filed (Tr. 2-16). Winston and all members of the County Board, defendants named in said Informations, filed demurrers which were sustained by the Circuit Court by order entered December 15, 1933 (Tr. 21-22). The State's Attorney elected to stand upon said amended Information and thereupon the same was dismissed (Tr. 22).

By opinion on the first appeal (*People ex rel Courtney v. Ashton*, 358 Ill. 146, 148) that Supreme Court stated the substance of the Information as follows:

"The people of the State of Illinois, on the relation of Thomas J. Courtney, State's Attorney of Cook County, and on his relation individually as a resident and taxpayer of that County, filed in the Circuit Court of Cook County two Informations against the members

of the Board of Commissioners of Cook County, the County Treasurer, the County Clerk, and certain attorneys therein named as defendants, seeking to enjoin the payment to the attorneys of county funds under alleged contracts entered into between the County Board and those attorneys.

* * * * *

"The Informations averred that Courtney is the State's Attorney of Cook County, and that on the 22nd day of May, 1931, and on June 6, 1932, the Board of Commissioners, without power or authority, went through the form of passing resolutions which are set out in the Informations, attempting in case No. 22412 to employ Henry M. Ashton and others to prosecute suits and collect delinquent real estate taxes and to authorize him to appear on behalf of and represent the people of the State and the County of Cook as attorney and solicitor, and fixed his compensation on a contingent basis. By amendment Edward M. Winston was substituted for Ashton. * * * The Informations allege that these contracts were *ultra vires* the power of the board and null and void. * * *"

And that Supreme Court stated the defense as follows:

"The defendants (Ashton-Winston-and all members of the County Board) filed a general and special demurrer to each of the Informations, which demurrers were sustained, and, plaintiff in error abiding the Informations, they were dismissed." (P. 149.)

On that appeal the cause was reversed by Supreme Court of Illinois, in the case of *People v. Ashton*, Cause 24212, and remanded to the Circuit Court of Cook County, with directions to overrule said demurrer (Tr. 22). Thereafter Thomas J. Courtney on April 19, 1935 filed his amendment and supplement to the aforesaid amended Information (Tr. 22-25).

By said various Informations Thomas J. Courtney as said informant sought to have declared *ultra vires*, certain

agreements incorporated in Legislation adopted by said County Board, employing said Ashton and said Winston as attorneys and counsellors-at-law, to prepare and file and prosecute before the Circuit and Superior Courts of Cook County, civil suits and proceedings to collect delinquent taxes, interest and penalties due on real estate in Cook County.

Winston filed his amended answer and counterclaim to said Information so amended and supplemented, and informant Courtney filed his motion to strike said answer and counterclaim on October 9, 1942 (Tr. 46-48). That motion was sustained by the Circuit Court of Cook County, and a decree entered that said Winston abided his said answer and counterclaim, and reciting "that defendant Winston take nothing by his suit and that the defendant go without day." (Tr. 49.)

Amended Answer and Counterclaim.

Winston by his pleading (Tr. 63 to 73), denies that said acts of the County Commissioners were *ultra vires* the power of the Board, and denies that the contracts for his legal services are null and void, and denies that at the time of the acts referred to no appropriation therefor was previously made, but on the contrary avers that there were a number of appropriations made by the County Board during the first quarter of the then fiscal year which were applicable to the contracts with Ashton and Winston and that said contracts were made with full power and authority of law.

The amended answer and the counterclaim proceeds to challenge the Information and its language in detail not material to this review (Tr. 63-70) and shows that the

action by the County Board was in due course of county business under the stress of depression and "tax payers strike."

The amended answer and counterclaim further avers (Tr. 70, 71) that pursuant to the said contracts, Winston in good faith put in many months of arduous professional legal labors both on the part of himself and of others under his supervision and to whom he is liable and expended large amounts of money and filed 818 suits for the collection of such delinquent taxes, penalties, costs and for the foreclosure of liens for such delinquent taxes and paid to the County moneys so collected or caused to be collected, aggregating more than Sixteen Million Dollars (358 Ill. 149). That there is due him for his services rendered under the contracts substantial compensation.

Amended answer and counterclaim further avers (Tr. 71) that the County received the benefit of said labors and expenditures by Winston and that the County of Cook and the Board of Commissioners and said Thomas J. Courtney are and each of them is and should be estopped from asserting or claiming that the contracts were or are invalid or that he, Winston, is not entitled to receive consideration therefor.

Amended answer and counterclaim further avers (Tr. 72) that before entering into the contracts the members of the County Board took counsel with Hayden Bell who was then County Attorney for Cook County, with John A. Swanson who was then State's Attorney, and with the Honorable Denis E. Sullivan who was then one of the Judges of the Superior Court of Cook County. That each of them advised the County Board that the contracts were valid and legal and proper. That the County Board acted upon such legal advice in entering into the contracts with Ashton and Winston.

Amended answer and counterclaim further avers (Tr. 72) that on the 13th day of June, 1939, the County Board and Winston entered into an accounting whereby a definite sum was found as the balance due him. That such accounting constituted an account stated. That Winston demands payment for the same, with legal interest thereon.

Amended answer and counterclaim (Tr. 50 to 54) invokes particularly Section 7 of Article X of the Constitution of the State of Illinois, which makes it the duty of the County Board to manage the county affairs. And it invokes sundry statutes of Illinois. Some of them are quoted below at the Appendix beginning on page 39. See also page 12.

Amended answer and counterclaim further avers (Abst. 56, 57) that in the numerous cases which Ashton and Winston commenced and prosecuted, the same were pending for sufficient lengths of time for the court in each case to take and have knowledge that the proceedings were conducted for and on behalf of the County by Ashton and Winston respectively, and by permitting, sanctioning and approving the acts in such cases of Ashton and Winston, respectively, while the same were so pending the court in such numerous cases in each instance by such acquiescence in effect appointed Ashton and Winston, respectively, as a competent attorney to prosecute such causes and proceedings, and the County and the County Board and the State's Attorney of Cook County then and now were and are estopped from setting up a claim that Ashton and Winston, respectively, were not properly and lawfully acting as such attorney with the same power and authority in relation to such causes or proceedings as the Attorney General or State's Attorney would have had if present and attending to the same; that because of the inability and unwillingness of the then State's Attorney of Cook County it became and was

the power and the duty of the County Board and of the County of Cook to provide and arrange to collect unpaid taxes as in and by the contracts with Ashton and Winston provided and authorized.

The fact allegations set forth by the amended answer and counterclaim of Winston (being admitted as true by the State's Attorney's motion to strike) constitute the factual background of this case.

How the Issues were Decided.

On October 23, 1942 the Circuit Court of Cook County sustained the motion of the State's Attorney to strike Winston's amended answer and counterclaim, and found as matter of law that the contracts are void; for the reason asserted that the County Board had no power or authority to contract with Ashton and Winston to perform the legal services, as set forth in the aforesaid resolutions adopted by said Board of Commissioners; on the ground that the sole and exclusive power to commence and prosecute suits and proceedings for the recovery of delinquent taxes and interest and penalties, is vested in the State's Attorney of Cook County. The decree further dismissed the counterclaim filed by Winston and ordered that the County of Cook go hence without day (Tr. 49). That decree was affirmed by the Supreme Court of Illinois and rehearing denied November 11, 1943.

In the Supreme Court of Illinois these are the Errors Relied Upon for a Reversal of the Order and Decree of the Trial Court.

(a) The court acted contrary to Statute and the Constitution and prior decisions as herein stated, in not sustaining the validity of the contracts here involved, and

erred by ordering and decreeing that said answer by Winston be stricken and that his counterclaim be dismissed.

(b) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in holding that the contracts and undertakings set forth in the legislation adopted by the Board of Commissioners of Cook County were *ultra vires* and beyond the power of said County Board.

(c) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in holding that the County of Cook was not liable for the services rendered and those moneys expended by Winston, in performing his contract and agreement with said County Board of Commissioners.

(d) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in not holding that the County of Cook was estopped, after receiving the benefit of the services rendered and the money expended by Winston in the performance of said contracts, from refusing to pay for such services and moneys so expended upon its order and request.

Foreword.

The opinion by the Supreme Court of Illinois, which was filed on September 23, 1943, in support of the judgment order now here under review, expressly names and repudiates its own prior decisions and interpretations of the Constitution and Statutes of Illinois (384 Ill. page 300). Upon those solemn decisions your petitioner and Cook County had acted and performed under contract. Those prior decisions and interpretations will now be mentioned in this petition as follows:

Important Illinois Cases.

Ottawa Gaslight & Coke Co., 138 Ill. 334 (1891).

This was a tax suit against the Gas Company by the County of La Salle to collect delinquent personal property taxes. The declaration was signed "M. T. Maloney, County Attorney." A motion was interposed in the trial court—

"To dismiss the suit because it had been started without authority of law and by an attorney not authorized by law to bring or prosecute the same."

The motion was supported by two affidavits; the first, by one of defendant's counsel, setting out that Maloney was not the State's Attorney of the County and that the records of the court failed to disclose "any appointment of Maloney to prosecute the case." There was also the supporting affidavit of the State's Attorney of the County, setting up that

"He (the State's Attorney) had neither been requested to prosecute the suit nor had he been sick, absent, or unable to attend the same, nor was he interested in the subject matter of the suit; that the suit was for recovery of a debt due the State of Illinois and La Salle County; but the State's Attorney (in the absence of the disabilities referred to) was alone authorized to prosecute; and that Maloney had no legal authority to institute or prosecute the suit."

There was a counter-affidavit by Maloney, setting up

"That he had been, by resolution of the Board of Supervisors of the County, authorized and directed to begin and prosecute the suit."

The trial court denied the motion to dismiss. A general demurrer was then interposed by the County to the declaration and the demurrer was overruled. Trial was had and judgment entered against the County for \$2,597.00 and costs. On appeal the judgment was reversed by the Su-

preme Court on the ground of improper admission of evidence; but the Supreme Court specifically held that Maloney could act as counsel for the County in the further prosecution of the case. In so holding, the Supreme Court said:

“It was not error to overrule the motion to dismiss the suit. The attorney who instituted the suit, it was shown, was in that regard acting by the direction and under the authority of the County Board; and the authority of the County Board to institute and prosecute suits for delinquent taxes, whether due upon delinquent lands or personal property, is amply given in Section 230 of the Revenue Law. (See page 39 below.)

“It is contended, however, that while the authority of the County Board to cause the institution of suits for unpaid taxes is ample, it is not at liberty to select counsel but must act by and through the State’s Attorney of the county.” [Citing Chap. 14, Sects. 5 and 6 concerning the powers of the State’s Attorney, and discussing them the Court continues:] “It would be perfectly competent for the County Board to direct the State’s Attorney to recover delinquent and unpaid taxes and to prosecute the same and in such case it would be his manifest duty to act. * * * We are not disposed, however, to hold that the County Board is, by the statute defining the duties of the State’s Attorney, denied the power and authority to select and empower any *competent attorney* to represent the People in beginning and prosecuting suits to recover delinquent taxes.” (See Statutes at page 39 below.)

Here we have a specific ruling by the Supreme Court in strong language, refusing the major contention of opposing counsel. The Supreme Court, in conclusion, on this point says:

“We have no doubt that under the general power of the County Board as the fiscal agent of the County it has the inherent right to direct the course of the proceeding [in suits to collect taxes] and to select the persons and agencies through which it will act.”

Another important case which is squarely in point is *County of Franklin v. Layman*, 145 Illinois, 138 (1893) Affirming 43 Ill. App. 163; also 34 Ill. App. 606).

This case likewise is so important that it deserves a full analysis. The case was twice before the Appellate Court and was twice tried by the trial court before a jury. The suit was brought by certain attorneys against the county to recover for legal services furnished the county under a special contract. At the end of the first trial a verdict was returned for plaintiffs and judgment entered for \$5367.76. This judgment was reversed in 34 Ill. App. 606, because of improper instructions given to the jury. On a second trial there was again a verdict for the plaintiffs for the same amount upon which judgment was entered. The second judgment was affirmed in 43 Ill. App. 163. The Supreme Court, in the case here under discussion, affirmed the Appellate Court on the second appeal.

It appears that prior to 1880 Franklin County had issued \$149,000 of its bonds in aid of a railroad company, \$100,000 of its bonds being based on one Enabling Act of the Legislature, and \$49,000 being based on a different Enabling Act. Some years later questions arose as to the validity of the bonds and the County determined to test their validity in the courts. In pursuance of that determination, the County Board made the special contract and employed the attorneys in the case. By the terms of the contract, the attorneys were

“To commence proper suits and prosecute the same to final determination * * * for a retainer of \$250 and the additional sum of \$8,000 if and when the litigation was finally determined in favor of the County.”

Thereupon there ensued several years of litigation as a result of which the County was successful, first, in defeating the \$49,000 issue of bonds, and later in defeating the

\$100,000 issue. At the time of this trial the County had already paid the attorneys for their proportional amount of fees based on the \$49,000 bond issue. After the \$100,000 bond issue had likewise been held invalid the County refused to pay the balance of fees for that service and the suit was brought to recover that proportionate amount of fees. As already stated, the trial court, the Appellate Court and the Supreme Court all held that the attorneys were entitled to recover.

In its opinion the Supreme Court said, among other things:

"It is next objected that the County could not lawfully enter into a contract to pay attorney's fees (under the facts of the case) * * * It is broadly conceded that the County had the right to test the validity of its doubtful obligations. But it is said that by the statute [Chap. 34, Sec. 33, concerning the duties of the County Board respecting suits, etc.] the power of the County Board is limited in its employment of counsel to prosecute suits in which the County is a party. We are not disposed to give this section the construction contended for it. * * *

"The County Board is authorized to carry into effect the powers of the County (Chap. 34, Sec. 33) among which is to make all contracts and to do all other acts in relation to the property and concerns of the County necessary in the exercise of its corporate powers. * * *

"We are of the opinion that such proceedings (as the litigation in the case) were within the spirit of the statute and that the *County Board had authority to enter into the said contract.*"

Here again we have a specific holding of the Supreme Court that the State's Attorney is not the exclusive attorney for a county board in civil proceedings; but that

where the county board determines it is necessary and desirable so to do, the county may employ outside counsel.

Another interesting case is

Wilson v. County of Marshall, 257 Ill. App. 220 (1930).

In that case the opinion holds that the County Board had power to make a special contract for outside attorneys, even though the State's Attorney had been available and had not been consulted. Justice Jones cites and relies on the cases of *County of Franklin v. Layman* and *Ottawa Gaslight Company v. The People*, which we have discussed above in detail.

Another important case, which arose in Cook County, is *People v. Straus*, 266 Ill. App. 95; 355 Ill. 640.

That was a tax foreclosure suit in the Superior Court where there had been an interlocutory order appointing a receiver of a large apartment hotel. The bill of complaint had been filed in the name of the People and was signed and sworn to by "Henry M. Ashton, their Attorney and Solicitor." Ashton had been appointed attorney for the County Board by a resolution of that Board. The resolution is set out in the opinion. It refers to the non-payment of taxes in the county over a period of years, and the Court takes notice of the recital of the resolution that there had been a vast accumulation of unpaid taxes, "thus creating an emergency situation with reference to the revenue."

It was contended by the defendant that

"As Ashton was neither the State's Attorney nor the Attorney General * * * he had no right or authority to represent the People in the present suit and the resolution of the Board * * * employing him for the purpose therein stated was *ultra vires* and void."

The opinion in the case is by Judge Gridley and is full and exhaustive. The opinion particularly refers to the case of *Abbott v. County of Adams*, 214 Ill. App. 201, cited and relied on by counsel for respondents in the case at Bar, and says that that opinion "has been overruled." Judge Gridley, in his opinion, refers to an opinion of the Attorney General (Attorney General's Opinion, 1928, page 240), holding that a County Board had legal authority to employ outside counsel in proceedings for the collection of delinquent taxes. The Attorney General's opinion is discussed at length thereafter. Judge Gridley's opinion concludes on this point:

"In view of the statutes above quoted, the holding in the *Ottawa Gaslight* Case and the resolution of the Board of Commissioners of Cook County, we are of the opinion that the contention of appellants' counsel (that the State's Attorney was the sole lawful counsel of the Board in such matters) is without substantial merit."

The Appellate Court reversed the case, only on the ground that the appointment of a trustee to take charge of and manage the property during foreclosure of the tax lien was illegal.

The case went back for trial on the merits and a decree of foreclosure was entered. The plaintiff thereupon went direct to the Supreme Court and that case is the one now to be discussed.

People v. Straus, 355 Ill. 640 (1934).

This was a writ of error from a decree of foreclosure of a tax lien in which there had been a decree for \$165,683.99 of back taxes and a sale to the County. In the Supreme Court the County was represented by the State's Attorney, but another law firm had been substituted as associate counsel for the solicitor who had appeared for

the County at the trial. In the Supreme Court the defendant again raised the objection that the trial in the County Court had been "improper" because the County had been represented by other counsel than the State's Attorney. The Supreme Court affirmed the decree below and denied the last mentioned contention, saying on this point:

"Numerous cases are cited tending to show that it was the proper function of the State's Attorney to prosecute the case, and there is much argument for the purpose of showing that the contract between the County Commissioners and the solicitor who appeared for the People in the trial court was contrary to public policy and void. The particular case relied on in this connection is *Fergus v. Russel*, 270 Ill. 304. That case is not in point here because the employment was directly attacked there and not brought collaterally, as is attempted here. In *Mix v. People*, 116 Ill. 265, we used the following language:

"The collection of the public revenue is of the utmost importance and no court should allow a suit of this character to be dismissed because the solicitor who brings it may not happen to be the State's Attorney or the Attorney General. * * * There is no statute requiring a bill of this kind to be signed in the official character of either of those officers, as there is with reference to an indictment.'

"It sufficiently appears that the Board of Commissioners of Cook County authorized the commencement of this suit in the name of the People and that the People ratified the action through a purchase at the foreclosure sale. Having thus authorized, approved and ratified everything that was done, it makes no difference to plaintiff in error whether or not said solicitor was duly authorized to bring this suit."

Here again we have the Supreme Court making two significant and important distinctions with respect to the

liability of the County in such cases as that now at Bar. In both cases the Supreme Court held that there was a difference between a direct attack on the right of the County Board to enter into a contract for employment of an attorney (and architect) and a case where a "collateral attack" was made after the employment had been effected and the work was done. In both cases the Supreme Court also held that where the party has accepted the benefit of the contract and the services rendered have been just and profitable to the County, it is then too late to raise even technical objections to the manner in which the contract for the employment has been made. This is an important point in the case at Bar, since it is admitted here that the contract in this case was very profitable to the County and the County was paying for the services out of extra "penalties" which were collected as a result of the tax suits started by the plaintiff as the County attorney.

Hall v. Cook County, 359 Ill. 528 (1935).

In our comment about the *Straus* case in the Superior Court, we referred to the case of *Hall v. Cook County*. The *Straus* case and the *Hall* case both establish the rule of law that the County is in a weaker position in contending that a contract for the employment of services of a professional character is invalid after the contract has been carried out and the County has received the benefit of it, than when a taxpayer's bill is filed to prevent the carrying out of the contract in advance of its execution. The *Hall* case is well known and need hardly be summarized here. The late Mr. Erich Hall, who was County Architect, recovered a judgment for \$137,000 for architect's fees for services rendered in drawing plans for the defunct "Cook County Auditorium" which the County had planned to build and then abandoned. There, as here,

the State's Attorney had objected to a recovery because, as it was contended, the County had no right to make the contract, and furthermore, had not made a prior appropriation for it. In rejecting the County's contention on this point, the Supreme Court said in the *Hall* case:

"The powers of the County are two-fold, viz.: its governmental powers and its business powers. Ordinarily, an estoppel or a waiver cannot be pleaded against a county for its failure to exercise its governmental powers, or the exercise of its governmental powers in an improper manner. This rule is not always true in the exercise of the municipality's business powers. In the cases cited by defendant * * * the assault was made by some taxpayer. * * * The same rule of strict construction should not be applied in behalf of a county where it attempts to take advantage of its own failure properly to exercise its business functions as is involved in behalf of the taxpayer who must pay the tax sought to be levied."

The earliest case which is concerned with the exact point raised by the motion to dismiss in this case seems to be *Mix v. People*, 116 Ill. 265 (1886).

In that case the County of Kankakee filed a bill to foreclose a tax lien on some property in which Mix was interested. Foreclosure suit was begun by special counsel employed by the County and not by the State's Attorney. The defendant contended that the County had not authorized the suit and that the solicitor for the County had, therefore, been unauthorized and the suit was unjustified. In rejecting this point the Supreme Court said in the *Mix* case:

"Plaintiffs in error sought * * * to question the authority of complainant's counsel to bring this suit. * * * Counsel for defendants in error have presented no authorities on the subject or referred to any suit

bearing upon it. We know of none, except Chapter 14, Sections 5 and 6, concerning the duties of the State's Attorney to prosecute 'all actions and proceedings for the recovery of its revenues, moneys, fees, benefits and forfeitures accruing to the State or his County.' The collection of the public revenue is of the utmost importance and no court should allow a suit of this character to be dismissed because the solicitor may not happen to be the State's Attorney."

Dalby v. People, 124 Ill. 66, 75.

"As to the right of recovery for all the taxes, section 230 of the revenue law in its first clause provides that the *county board may institute suit* in an action of debt in the name of the people of the state of Illinois for the whole amount due on forfeited property; or any county, city, town, school-district, or other municipal corporation to which any such tax may be due, may institute suit in an action of debt in its own name for the amount of such tax due any such corporation on forfeited property. The second clause provide sthat the *county board may also institute suit* in an action of debt in the name of the people of the state of Illinois against any person for the recovery of any personal property tax due from such person. Thus it appears that the first clause, with respect to forfeited property, provides that the county board *may sue* for the whole amount of the taxes due on forfeited property, or only for the amount due the county; the suit in the former case to be brought by *the county board in the name of the people*; in the latter case, in the name of the county. The second clause respects personal property tax alone, and provides that the county board may also bring suit in the name of the people for the recovery of any personal property tax due from any person. Any personal property tax due from a person, embraced every personal property tax due from the person. Had the intention been to give to the county board the right of recovery only for the personal property tax due

the county, we must think the limitation to the tax due the county would have been expressly named, and the right of action have been given in the name of the county, as was done in the first clause, in providing for recovery by a county of the amount of the tax due the county on forfeited property. We think, under the section last named, the right of recovery here is for all these personal property taxes due from the defendant; and, when recovered, it will be the duty of the county board to distribute them to the several municipal corporations to which they belong, as would have to be done in the case of a recovery by the county board under the first clause of the section of the whole amount of taxes due on forfeited property.

“The judgment will be affirmed.”

Attorney General's Opinion.

We have already referred, in the Appellate Court decision in the *Straus* case, *supra*, to an opinion of the Attorney General of the State on the question here under consideration. In Attorney General's Opinions for year 1928, page 239, the State's Attorney of Alexander County addressed an inquiry to the Attorney General, asking the question—

“The County Board of Commissioners would like to know if they have any authority to employ outside assistance in collecting delinquent taxes.”

In answering this question in the affirmative, the Attorney General said:

“In answer to your question, allow me to draw your attention to the following cases (citing *Ottawa Gaslight & Coke Company v. People*, 138 Ill. 336; *Abbott v. County of Adams*, 214 Ill. App. 201; *Stevens v. Henry County*, 218 Ill. 468; *Fergus v. Russel*, 270 Ill. 304; and continuing): An examination of the cases of *Abbott v. County of Adams* (*supra*) and *Stevens v. Henry County* (*supra*) and *Fergus v. Russel*

(*supra*) shows that neither of these cases is the same as *Ottawa Gaslight & Coke Company v. People* (*supra*). Inasmuch as the Supreme Court has not reversed the rule stated in the case of *Ottawa Gaslight Company* (*supra*) it is my opinion that the County Board may employ a competent attorney other than the State's Attorney to represent the People in beginning and prosecuting suits to recover delinquent taxes."

The judgment and opinion by the Supreme Court of Illinois filed on September 23, 1943, now here under review, thereby expressly admits (384 Ill. at page 300) that said judgment order against your petitioner is an arbitrary departure from the established and prior law of the State of Illinois, as announced by the Supreme Court of Illinois. That is an admission that the ruling in this case is *ex post facto* as to the contract and property rights of your petitioner, and that the judgment now under review is a deliberate denial of his constitutional rights stated elsewhere in this petition. That Court said at page 300:

"The statements in those cases which are contrary to to the conclusions reached are not adhered to."

Arbitrary Action By State's Attorney.

Every county budget approved by Thomas J. Courtney for the 12 years that he has been in office from the year 1933 to the year 1944 inclusive, has provided for the employment of Special Attorneys for the County Board and for various County Officers. This action so approved by Thomas J. Courtney, State's Attorney of Cook County, is illustrated by the items from the County Budget of Cook County for the year 1943 which are reproduced below at page 38. It is unconscionable and purely autocratic for Courtney as State's Attorney, to contend as he has in this lawsuit, that the County Board has no power to employ Winston, when during the same period and under the same Constitution and Statutes, Courtney has expressly ap-

proved such County Budgets. Furthermore, it is unconscionable and purely autocratic and a wilful attempt to destroy the property rights of Winston without any process of law, when Courtney delays the conclusion of this lawsuit for ten years after 1934 when the prior ruling was made by the Supreme Court of Illinois; before he insists upon a ruling now adverse to Winston, after Courtney has joined in the contention made in the case of *People v. Straus*, 266 Ill. App. 95, and 355 Ill. 640, which were sustained to the effect that no parties on that record could object to the validity of the employment of Winston as counsel and attorney for Cook County, with reference to delinquent tax proceedings. This shows a deliberate intention by Courtney as State's Attorney, to reap for the County the full advantage and effect of the legal services rendered by Winston for the County, before he would bring forward for decision and conclusion the question as to payment of Winston for legal services to Cook County. We submit that is not only unconstitutional and illegal, but it is plainly immoral. That is so stated and established by many decisions of this Court.

Conclusion for Relief.

Your petitioner submits that he did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court and Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioner prays the allowance of your writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

WEIGHTSTILL WOODS,
Counsel for Petitioner.

Appendix to Petition for Certiorari.

Cook County Appropriation Bill for Year 1943.

Page	Item	Amount
34	1-134 Outside Special Attorneys—for the purpose of employing special counsel and investigators to handle such legal matters as may be assigned by the President or Members of the Board of Commissioners of Cook County	\$ 7,500
53	8-12E Special work on 1943 personal property Assessment including analysis Federal Income Tax Returns (and other items)	\$13,410
60	10-134 Outside Special Attorneys	\$10,000
63	11-1 One Attorney	\$ 4,999
77	19-1 One Sheriff's Attorney	\$ 6,499
110	29-1 One Attorney	\$ 3,600
133	40-134 Outside Special Attorneys	\$50,000

(The foregoing kinds of items appear throughout all budget ordinances for all years. Said items are entirely distinct from and outside the provision made for the State's Attorney's Staff at page 85. That staff includes eighty-odd persons as attorneys. Budget Ordinances are Legislation of which all courts take judicial notice by statute.)

Constitution of Illinois Article 5, Section 24:

‘Office and employment defined.

“An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished.”

Illinois Revised Statutes Chapter 13:

“A license, as provided for herein, shall constitute the person receiving the same, an attorney and counsellor at law, and shall authorize him to appear in all of the courts within this State and there to practice as an attorney and counsellor at law, according to the laws and customs thereof, for and during his good behavior in said practice and to demand and receive fees for any services which he may render as an attorney and counsellor at law in this State.” (Section 1.)

Illinois Revised Statutes, Chap. 120, as amended June 28, 1917 (see page 26 above):

“*Suit by county for tax on forfeited property. Sec. 230. The county board may, at any time, institute suit in an action of debt in the name of the People of the State of Illinois in any court of competent jurisdiction for the whole amount due for taxes and special assessments on forfeited property; or any county, city, town, school district or other municipal corporation to which any such tax or special assessment may be due, may, at any time, institute suit in an action of debt in its own name, before any court of competent jurisdiction, for the amount of such tax or special assessment due any such corporation on forfeited property, and prosecute the same to final judgment. The county board may also, at any time, institute suit in an action of debt in the name of the People of the State of Illinois, in any court*

of competent jurisdiction, against any person, firm or corporation, for the recovery of any personal property tax due from such person, firm or corporation, and in tax due from such person, firm or corporation, for the recovery of any personal property tax due from such person, firm or corporation, and in any such suit for the recovery of personal property tax, the return of the county collector that such taxes are delinquent shall be prima facie evidence that such taxes are due and unpaid but the fact that such taxes are due and unpaid may be proven by other competent testimony. This act shall apply to all taxes heretofore levied against any person, firm or corporation and now upon any assessment book or roll, and on the sale of any property following such judgment on execution or otherwise, any *such county, city, town or school district or other municipal corporation, interested in the collection of said tax, may become purchaser at such sale of either real or personal property, and if the property so sold is not redeemed (in case of real estate) may acquire, hold, sell and dispose of the title thereto, the same as individuals may do under the laws of this state, and in any such suit or trial for forfeited taxes, the fact that real estate or personal property is assessed to a person, firm or corporation shall be prima facie evidence that such person, firm or corporation was the owner thereof, and liable for the taxes for the year or years for which the assessment was made, and such fact may be proved by the introduction in evidence of the proper assessment book or roll, or other competent proof."*

By Amendment in 1939, May 17, the only change made was to erase the words "action of debt" and substitute the words "in a civil action," and one other similar clause.

(19)

U. S. Court, U. S.
FILED
APR 7 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 786

EDWARD M. WINSTON,
Petitioner,
VS.

**THOMAS J. COURTNEY, State's Attorney, COUNTY
OF COOK, a Municipal Corporation of the State of
Illinois, and others,**
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ILLINOIS.
THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF
COOK COUNTY.

**ANSWER TO THE PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT
OF ILLINOIS, AND BRIEF IN SUPPORT
THEREOF.**

THOMAS J. COURTNEY,
State's Attorney of Cook County,
FRANCIS S. CLAMITZ,
WILLIAM J. TUOHY,
JOSEPH P. BURKE,
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Attorneys for Respondents.

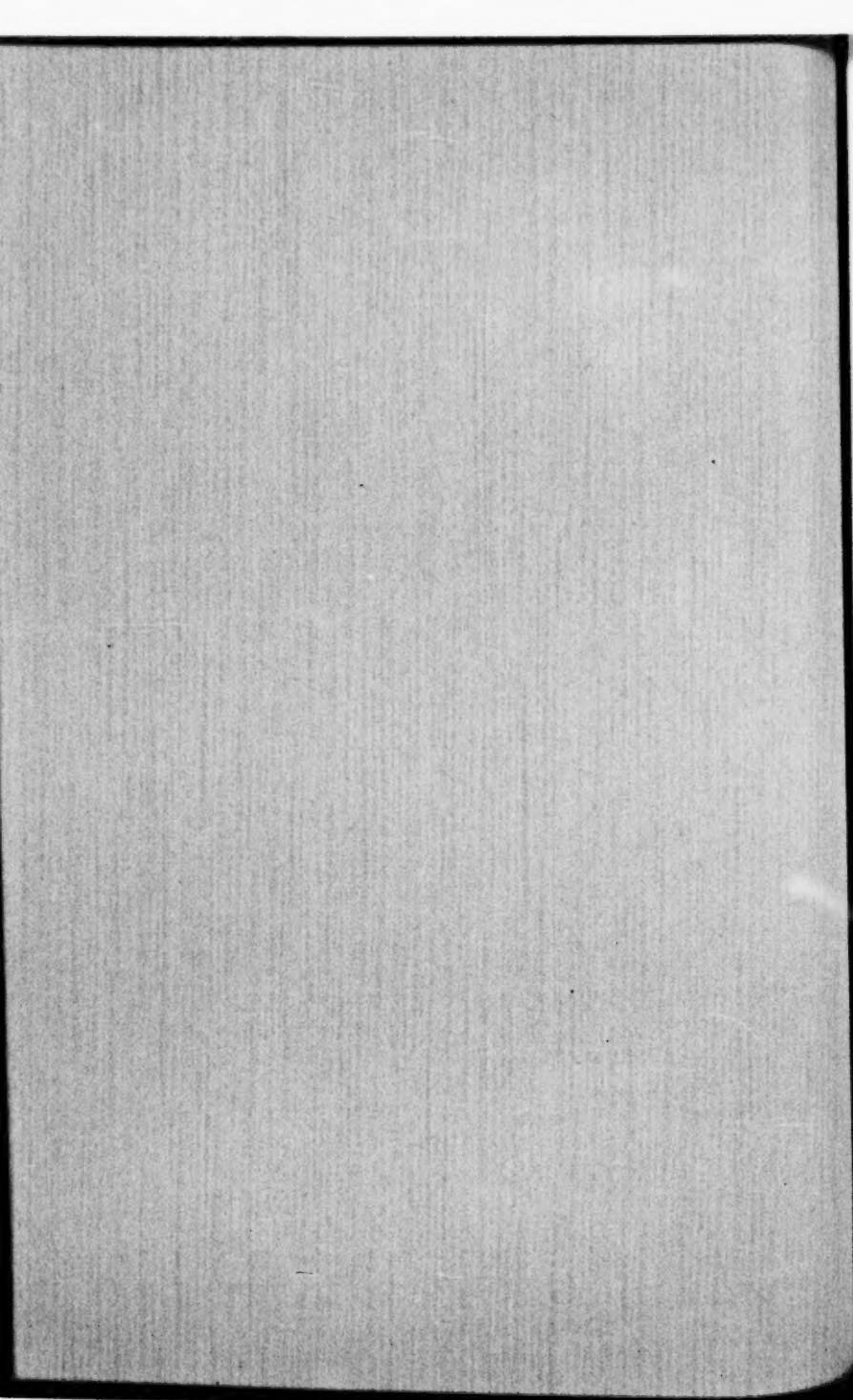


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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 786

EDWARD M. WINSTON,

Petitioner,

vs.

THOMAS J. COURTNEY, State's Attorney, COUNTY
OF COOK, a Municipal Corporation of the State of
Illinois, and others,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ILLINOIS.

THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF
COOK COUNTY.

**ANSWER TO THE PETITION FOR WRIT OF CER-
TIORARI TO THE SUPREME COURT OF ILLINOIS,
AND BRIEF IN SUPPORT THEREOF.**

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The respondents, THOMAS J. COURTNEY, State's Attorney
of Cook County, Illinois, and COUNTY OF COOK, a Municipal
Corporation, for answer unto the prayer of the Petitioner
that this Court grant a writ of certiorari to review the
final order of the Supreme Court of Illinois, says that
there are no special or important reasons in this cause for
a review or writ of certiorari; that no question under the
United States Constitution was raised or decided in the

trial or Appellate Courts below; that the decision of the Supreme Court of Illinois did not deprive the petitioner of any vested right without due process of law, equal protection of the laws of the State of Illinois or impair the obligation of the petitioner's purported contract with the County of Cook, State of Illinois; nor has it decided a federal question in conflict with applicable decisions of the court or departed from the usual and accepted course of judicial procedure or sanctioned such a departure by the lower court.

Wherefore, these respondents ask that the writ of certiorari be denied, and offers the annexed brief and appendix thereto in support hereof.

Respectfully submitted,

COUNTY OF COOK,

a Municipal Corporation,

By THOMAS J. COURTNEY,

*State's Attorney of Cook County,
Illinois,*

By FRANCIS S. CLAMITZ.

THOMAS J. COURTNEY,

*State's Attorney of Cook County,
Illinois,*

By FRANCIS S. CLAMITZ.

Counsel for Respondents:

THOMAS J. COURTNEY,

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FRANCIS S. CLAMITZ,

WILLIAM J. TUOHY,

JOSEPH P. BURKE,

*Assistant State's Attorneys,
507 County Bldg., Chicago, Ill.*

BRIEF IN SUPPORT OF ANSWER.

STATEMENT OF THE CASE.

The statement of the case presented by the petitioner is replete with argument based upon assumed facts and contains many references to matter nowhere contained in the transcript filed in this court and contains statements of matter purporting to be contained in the record of this case which are unsupported by any reference to the transcript page, whereby the same may be verified. The respondents have therefore stated the facts of the case in a manner which we believe will inform the court of the matters in issue. We have not answered the various personal or political statements contained in the petitioner's statement of the case as they are neither germane to the proceeding nor properly included therein.

On May 22, 1931, the board of commissioners of Cook County adopted a resolution purporting to employ Henry M. Ashton as an attorney, which resolution, with appellants' written acceptances and certain supplementary resolutions, constitutes the contracts involved in these cases. In the preamble to the resolution it was recited that there was more than \$16,500,000 due in taxes on real estate in Cook County that had been forfeited to the State for non-payment; that by statute it was the nominal duty of the State's Attorney of the county to prosecute actions for the collection of delinquent taxes, if and when the county board provided by budget for the same, but that in recent months the number of forfeitures had increased to such an extent that the appropriation for the current year to the State's Attorney was inadequate to enable him to perform

the work involved in bringing such a large number of cases. It was stated that a large number of persons who had permitted their real estate to be forfeited for non-payment of taxes were financially responsible; that a large amount was due as penalties, that in some instances the accumulated penalties exceeded the amount of taxes due, and that all penalties when collected were the property of the county. It was stated that the regular duties of the legal adviser of the county board were such that he did not have time to enforce the collection of forfeited real estate taxes, that during the last five years the State's Attorney had collected in forfeited taxes and penalties about \$200,000 per year. In consideration of such premises, it was resolved:

“That Henry M. Ashton, attorney at law be and he is hereby retained and employed to begin and prosecute foreclosure suits and such other suits or proceedings as may be deemed desirable in order to collect the revenue now due to the State of Illinois and other taxing bodies from real estate in Cook County that is now forfeited to the state:

“That said Henry M. Ashton is hereby authorized and empowered to appear for and in behalf of and to represent the People of the State of Illinois and the County of Cook in all such suits as their attorney and solicitor; * * *

“As the amount provided for in the 1931 budget to take care of this work of securing additional revenue from forfeited property in Cook County is not sufficient to insure a continuation of said work, the contract between this Board and the said attorney shall be considered a contingent one from the beginning of said attorney's employment. The sums to be paid by Cook County, as above set forth and as appropriated, shall be considered as an advance to said attorney for fees and expenses in order that said work may be properly started;

“However, all sums paid to said attorney, as well as all sums paid to his assistant, for clerk hire, steno-

graphic, and other expenses, shall be first deducted before any further money shall be paid to said attorney; * * *."

Provision was made in the contract to pay Ashton \$600 per month and an additional amount of \$700 per month budgeted as follows: an assistant not to exceed \$300, a clerk \$250 and a stenographer \$150. It also provided that Ashton should be paid a contingent fee, the same to be computed upon the taxes and penalties collected, but that such fee should not be paid except from the penalties so collected. Various contingencies were set forth upon which the contingent fee was payable, the lowest percentage being fifteen per cent (15%) of the tax and penalty where there was one penalty, and scaling upwards of twenty per cent (20%) where there were two penalties, and twenty-five per cent (25%) where there were more than two, with the further provision that if in any six months' period voluntary settlement was made with the county treasurer through the State's Attorney's office, where the sum received exceeded \$150,000, then Ashton was to receive as further fee a sum equal to five per cent (5%) of such excess, with the provision that in computing the amount due under the five per cent (5%) clause the sums collected either by the State's Attorney or Ashton by suit or foreclosure should not be included. Claims for the regular monthly charges were to be paid on Ashton's verified statement and settlements were to be made as specified. It provided that the board of commissioners reserved the right to determine the basis of settlement with the property owner and the amount of penalty to be paid in cases where there was an adjustment for less than the total allowed by statute. It was stated that the contract should be effective as of May 15, 1931, and should terminate on November

30, 1932, unless renewed by the county board and said attorneys.

On May 25, 1931, Henry M. Ashton addressed a communication to the board, which referred to the resolution of May 22nd and stated that he accepted the employment on the terms outlined and would proceed with the work at once. The then State's Attorney approved the resolution as to form.

On April 16, 1932, Ashton addressed another communication to the board suggesting that Edward M. Winston, who is one of the appellants herein, be authorized to carry out Ashton's contract from that date until December 1, 1932. The request was approved April 27, 1932, and Edward M. Winston was given full power and authority to represent the board

"in all suits heretofore brought under said contract and to carry such suits to completion; and authority is also given hereby to the said Edward M. Winston to begin and prosecute with full power as attorney for this Board all other suits and proceedings which he may deem necessary and desirable to collect delinquent taxes due and unpaid on real estate in Cook County under the terms and conditions as to compensation which were provided in the contract with Henry M. Ashton."

On November 22, 1932, the board adopted a further resolution which recited

"That the authority heretofore granted by resolution of this Board to Edward M. Winston to represent said Board is hereby extended to March 15, 1933, with full power to begin any suits for collecting of delinquent taxes which he may deem desirable during the said period and to prosecute them to completion, and that the terms and conditions set forth in the original contract with Henry M. Ashton, dated May 15, 1931, and the resolution of authority to

Edward M. Winston dated April 27, 1932, shall be in force except as herein modified."

At the November election, 1932, Thomas J. Courtney, the present State's Attorney was elected to succeed the former State's Attorney and on July 22, 1933, he filed an information in equity in the Circuit Court of said county in which he made Ashton, Winston and several members of the board of commissioners parties defendant. It was alleged that Ashton and Winston had received \$20,000 pursuant to said contract, that another item of \$7263.92 had been audited, county warrants issued and would be delivered unless enjoined by decree of court. It was charged that the several resolutions adopted by the board were *ultra vires*, that the contract was illegal and void. The prayer was that Ashton and Winston be required to account for the \$20,000 previously received, that payment of the \$7263.92 be enjoined and that plaintiffs be granted general relief.

The county commissioners, Ashton and Winston filed separate pleadings. An issue was raised on a motion to dismiss as to whether it was within the powers and duties of the State's Attorney to bring an action on behalf of the People against the county commissioners of the county while he was the legal adviser of such board. The motion was sustained and the cause dismissed. On direct appeal (*People v. Ashton*, 358 Ill. 146) the decree was reversed and the cause remanded with directions.

After the cause was redocketed and the mandate filed Ashton and Winston each filed an answer. *Winston also filed a counterclaim to recover the fees due on the contract.* He claimed the amount due was in excess of one and one-half million dollars. The State's Attorney's motion to strike Winston's answer and counterclaim was sustained

and Winston elected to stand by his pleading whereupon a final judgment was entered against him. He brings the cause here for review.

Cause No. 27163 is an action at law instituted by Ashton and joined in by Butz against the County of Cook to receive the fees alleged to be due on the same resolutions and acceptances set forth in No. 27169. Winston was made a defendant. This suit was filed June 26, 1939. Butz filed a separate complaint in which it was alleged that during the regime of both Ashton and Winston he carried the burden of drawing the pleadings in all cases filed to enforce the collection of delinquent taxes; that he filed petitions to intervene in certain cases pending in the Federal courts and prosecuted claims in Probate Court against estates of deceased persons, and that Ashton, Winston, the County of Cook and the then State's Attorney had knowledge that he was performing such services. He claimed \$1,714,682.92 was due him for fees. A second count was on *quantum meruit*. *Winston filed an answer and counterclaim adopting Ashton's and Butz's pleadings.*

The State's Attorney's motion to strike Ashton's and Butz's complaint and Winston's answer and counterclaim was sustained and a final judgment entered. Ashton and Butz perfected a joint appeal to the Supreme Court of Illinois and Winston perfected a separate appeal. They will be referred to as appellants, and the People as represented by the State's Attorney as appellee.

People's motion to dismiss contained nine assignments but the ones urged (here) as grounds for reversal pertain solely to the power of the board of commissioners to make the contracts in question. Appellants have also pleaded estoppel against the county. (It is not claimed that appellants were employed to render service in actions then

pending, therefore, the provisions of section 6 of the State's Attorneys Act (Ill. Rev. Stat. 1941, chap. 14, par. 6) have no application.)

The law authorized court action to enforce the collection of delinquent real estate taxes. That appellants filed such suits in the name of the People and as a result of their efforts there was collected and paid into the county treasury it was alleged more than \$16,000,000 for the purpose of raising questions of law only, this is admitted. The principal question is as to the power of the board to employ private counsel to conduct such litigation.

I.

NO QUESTIONS UNDER THE FEDERAL CONSTITUTION WERE RAISED IN THE TRIAL OR APPELLATE COURT BELOW.

The rule is well established in the courts of last resort of the various states and in this Court that the Federal right alleged to have been infringed must have been adjudicated against the claimant in the State court.

While the pleadings of the Petitioner disclosed that he has raised questions of construction of the Statutes and Constitution of the State of Illinois in his pleadings in the trial court and in his brief and Petition for rehearing in the Supreme Court of Illinois, nowhere does it appear either in the pleadings or his briefs or Petition for rehearing that he has raised any question under the Constitution of the United States.

This Court in the case of *Cleveland and Pittsburgh Railroad Company v. City of Cleveland, Ohio*, 235 U. S. 50, said:

“In order to bring a case to the Supreme Court it is well settled that the Federal right must have been set

up and adjudicated against the claimant by the judgment of the State court. It is equally well settled that the contention made and passed upon in the State Court cannot be enlarged by assignments of error made to bring the case to this Court. *Nat. Bank v. Kentucky*, 9 Wall. 353; *Re Spies*, 123 U. S. 131; *Zadig v. Baldwin*, 166 U. S. 485; *Oxley Stove Co. v. Butler County*, 166 U. S. 648; *Waters Pierce Oil Co. v. Texas*, 212 U. S. 112; *Mallors v. Commercial Loan & Trust Co.*, 216 U. S. 613; *Appleby v. Buffalo*, 221 U. S. 524.

"It is equally well settled that an impairment of the obligation of the contract, within the meaning of the Federal Constitution must be by subsequent legislation, and no mere change in Judicial decision will amount to such deprivation. *Ross v. Oregon*, 227 U. S. 150; *Moore Mansfield Construction Co. v. Electrical Installation Co.*, 234 U. S. 619."

No Federal question having been raised in the courts below, this Court is without jurisdiction to grant the return of certiorari prayed by the Petitioner.

II.

THE ACT OF THE ILLINOIS SUPREME COURT IN ALLEGEDLY CHANGING ITS CONSTRUCTION AND INTERPRETATION OF THE ILLINOIS CONSTITUTION AND STATUTES DID NOT OPERATE TO IMPAIR THE OBLIGATION OF THE PETITIONER'S PURPORTED CONTRACT.

This controversy was previously before the Supreme Court of the State of Illinois in the case of *People v. Ashton*, 358 Ill. 146, in which was involved the very contract here involved. In that Appeal the question involved was whether or not the State's Attorney was the proper party to bring in Information for the purpose of testing the power of the County Board to enter into the purported

contract with the Petitioner. While not finally determinative of the law in regard to the power of the Board of County Commissioners of Cook County to enter into the contract the Court decided that the County Board may not strip a constitutional officer of his powers nor transfer them to others. At pages 150-151, the Court said:

“Section 22 of article 6 of the constitution provides for the election of a State’s attorney. Section 32 of that article concerns the residence, performance of duties of the State’s attorney and other officers and the filling of vacancies in the office. Those duties are to be as prescribed by law. The question arising in this connection is whether the county board has power to deprive the State’s attorney of those duties or transfer them to private counsel. In *Fergus v. Russel*, 270 Ill. 304, the duties of a constitutional officer, such as State’s attorney, are definitely stated, and it is there held that a legislative body may not strip a constitutional officer of his powers nor transfer them to others. Section 5 of the act entitled, ‘An act in regard to Attorney General and State’s attorney. Among them is to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in this county in which the people of the State or county may be concerned. By section 33 of chapter 34 (Smith’s Stat. 1933, p. 847,) it is made the duty of the county board ‘to take and order suitable and proper measures for the prosecuting and defending of all suits to be brought by or against their respective counties, and all suits which it may become necessary to prosecute or defend to enforce the collection of all taxes charged on the State assessment.’ ”

From the foregoing it may be seen that the decision of the Illinois Supreme Court in the instant case, sought to be reviewed herein, could not be different than it is unless the Supreme Court of Illinois were to overrule its decision in the case of *People v. Ashton*. The Illinois Supreme

Court, in *People v. Ashton*, 358 Ill. 146, 151, *supra*, in saying that

“In *Fergus v. Russel*, 270 Ill. 304, the duties of a constitutional officer, such as *State's Attorney*, are definitely stated, and is there held that a legislative body may not strip a constitutional officer of his powers nor transfer them to others.”

We have, therefore, in the State's attorney a constitutional officer whose powers may not be stripped or transferred by a legislative body. This brings us to the question of whether the Board of County Commissioners, being admittedly a legislative body, attempted to strip the State's attorney, a constitutional officer, of powers belonging to his office, or attempted to transfer powers belonging to his office to others.

In the instant case the Supreme Court of Illinois, speaking through Mr. Justice Murphy, said:

“The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer. (*Fergus v. Russel*, 270 Ill. 304; *Stevens v. Henry County*, 218 Ill. 468; *Hope v. City of Alton*, 214 Ill. 102.) The contract of employment under which appellants claim were *ultra vires* and void.”

(This case is reported Vol. 384 Ill., p. 283, which opinion is set in full as an Appendix to this Brief.)

It may thus be concluded that there was no change in construction of decision which deprived the Petitioner of any right without due process of law or denied him equal protection of the laws of the State of Illinois.

III.

**CONSTITUTIONAL PROVISION DECLARING THAT
NO STATE SHALL PASS ANY LAW IMPAIRING
THE OBLIGATION OF CONTRACTS APPLIES ONLY
TO THE LEGISLATURE AND NOT TO JUDICIAL
ACTIONS.**

The record of this case nowhere reveals that the petitioner bases his claim to any federal right upon any action by the legislature. He does, however, contend that the Illinois Supreme Court did impair the obligation of his purported contract by finding that no contract in fact exists. He alleges that the Illinois Supreme Court by its construction of the Illinois Constitution and Statutes impaired his constitutional rights.

Claims of this type have been made before this Honorable Court in cases too numerous to cite completely. Counsel for respondents will cite but a few of them, well knowing that this Court is conversant with the principle involved.

In the leading case of *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, this court said

“It has been settled by a long line of decisions that the provision of Section 10, Article 1, of the Federal Constitution, protecting the obligation of contracts against state actions, is directed only against impairment by legislation and not by judgment of the courts. The language—‘No State shall—pass any—law impairing the obligation of contracts’—plainly requires such a conclusion. However, the fact that it has been necessary for this court to decide the question so many times is evidence of persistent error in regard to it.

“*Commercial Bank v. Buckingham's Executors*, 5 How. 317, 343; *Railroad Co. v. Rock*, 4 Wall 177;

Railroad Co. v. McClure, 10 Wall 511; *Knox v. Exchange Bank*, 12 Wall 379, 383; *LeHigh Water Co. v. Easton*, 121 U. S. 338; *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 30; *Brown v. Swart*, 145 U. S. 454; *Central Land Co. v. Laidley*, 159 U. S. 103; *Bacon v. Texas*, 163 U. S. 207; *Hanford v. Davis*, 163 U. S. 273; *Turner v. Wilkes County Commissioners*, 173 U. S. 635; *Hubert v. New Orleans*, 218 U. S. 438; *Cross Lake Shooting and Fishing Club v. Louisiana*, 224 U. S. 632; *Ross v. Oregon*, 227 U. S. 150; *Kryger v. Wilson*, 242 U. S. 171; *Rooker v. Fidelity and Trust Co.*, 261 U. S. 114; *Columbia Ry. Co. v. South Carolina*, 261 U. S. 236."

To the same effect see also *National Mutual B. & L. Ass'n v. Brahan*, 193 U. S. 635 and *Bacon v. Texas*, 163 U. S. 207.

A.

The judicial determination that no contract in fact exists is not an impairment of the obligation of contract under the Federal Constitution, and is finally determinable by the Supreme Court of Illinois.

The petitioner confuses the importance of the questions to him with their importance objectively. He asked this Court to take a case and render an opinion which would necessarily conflict with previous decisions of this Court in cases where the applicable law is well settled. In the case of *Toole County Irrigation District v. Moody, et al.*, 125 F. 2nd 498, certiorari denied, 316 U. S. 690 the facts involved were similar to the facts in the instant case. In that case, the petitioners beg the question as they do in the instant case by assuming that a contract existed. In that case, as in the instant case, the Court below held that no contract in fact existed because of the lack of power on the part of the municipality to enter into a contract of the

nature involved. In the *Toole County* case, the Court said:

“Appellees argue that to give effect to the Montana decisions would violate the Constitution by impairing the obligation of a contract, namely the district’s obligation the existence of which is here in dispute. Appellees argument assumes the existence of the obligation and thus begs the question, the question being whether or not the obligation exists. Whether it exists or not must be determined by the law of Montana as declared in *State ex rel. Malott v. Board of County Commissioners* and *Rosebud Land and Improvement Co. v. Carterville Irrigation District*. According to that law, the obligation which appellees say must not be impaired does not exist.”

The Supreme Court of Illinois merely decided that the Board of County Commissioners of Cook County had no power to enter into the contracts by virtue of any statute and that it was the duty of the State’s Attorney of Cook County to perform the services which were the subject matter of the purported contract. As to these matters, we submit that the opinion of the Supreme Court of Illinois is final.

CONCLUSION.

We submit that the petitioner has not shown the actual existence of grounds for the issuance of a writ of certiorari, and respectfully request that his petition be denied.

Respectfully submitted,

THOMAS J. COURTNEY,

State’s Attorney of Cook County.

FRANCIS S. CLAMITZ,

WILLIAM J. TUOHY,

JOSEPH P. BURKE,

Assistant State’s Attorneys,

Attorneys for Respondents.



APPENDIX TO ANSWER TO PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE ILLINOIS SUPREME COURT.

Docket Nos. 27163 and 27169, Cons.—Agenda 25—May, 1943.

The People *ex rel.* Thomas J. Courtney, Appellee, v. Henry M. Ashton *et al.*, Appellants.—Henry M. Ashton *et al.*, Appellants, v. The County of Cook *et al.*—(The County of Cook, Appellee.)

MR. JUSTICE MURPHY delivered the opinion of the court:

Pursuant to an order entered in vacation, causes No. 27163 and No. 27169 were consolidated for oral argument and opinion. The primary question in each case is as to the liability of the county of Cook to pay appellants Henry M. Ashton, Edward M. Winston and Ralph O. Butz, all of whom are lawyers, for legal services performed by them for the county pursuant to the terms of contracts of employment. The contracts provided that appellants were to institute legal proceedings and take such steps as were necessary to collect forfeited real estate taxes and penalties. On behalf of the People, represented by the State's Attorney of Cook county, it was contended that the board of commissioners of the county acted without authority of law, that their acts were *ultra vires* and the contracts void. It is claimed that the action of the board in employing private attorneys to perform such service was in effect taking a power and duty given by the constitution and statute to the State's Attorney and conferring it on another. These contentions involve interpretation of certain provisions of our State constitution and this gives the court jurisdiction to review the cases on direct appeal.

On May 22, 1931, the board of commissioners of Cook county adopted a resolution purporting to employ Henry M. Ashton as an attorney, which resolution, with appellants' written acceptances and certain supplementary reso-

lutions, constitutes the contracts involved in these cases. In the preamble to the resolution it was recited that there was more than \$16,500,000 due in taxes on real estate in Cook county that had been forfeited to the State for nonpayment; that by statute it was the nominal duty of the State's Attorney of the county to prosecute actions for the collection of delinquent taxes, if and when the county board provided by budget for the same, but that in recent months the number of forfeitures had increased to such an extent that the appropriation for the current year to the State's Attorney was inadequate to enable him to perform the work involved in bringing such a large number of cases. It was stated that a large number of persons who had permitted their real estate to be forfeited for nonpayment of taxes were financially responsible; that a large amount was due as penalties, that in some instances the accumulated penalties exceeded the amount of taxes due, and that all penalties when collected were the property of the county. It was stated that the regular duties of the legal adviser of the county board were such that he did not have time to enforce the collection of forfeited real estate taxes, that during the last five years the State's Attorney had collected in forfeited taxes and penalties about \$200,000 per year. In consideration of such premises, it was resolved: "That Henry M. Ashton, attorney at law be and he is hereby retained and employed to begin and prosecute foreclosure suits and such other suits or proceedings as may be deemed desirable in order to collect the revenue now due to the State of Illinois and other taxing bodies from real estate in Cook county that is now forfeited to the state:

"That said Henry M. Ashton is hereby authorized and empowered to appear for and in behalf of and to represent the People of the State of Illinois and the County of Cook in all such suits as their attorney and solicitor; * * *

"As the amount provided for in the 1931 budget to take care of this work of securing additional revenue from forfeited property in Cook county is not sufficient to insure a continuation of said work, the contract between this Board and the said attorney shall be considered a contingent one from the beginning of said attorney's employment. The sums to be paid by Cook county, as above

set forth and as appropriated, shall be considered as an advance to said attorney for fees and expenses in order that said work may be properly started;

"However, all sums paid to said attorney, as well as all sums paid to his assistant, for clerk hire, stenographic, and other expenses, shall be first deducted before any further money shall be paid to said attorney; * * *."

Provision was made in the contract to pay Ashton \$600 per month and an additional amount of \$700 per month budgeted as follows: an assistant not to exceed \$300, a clerk \$250 and a stenographer \$150. It also provided that Ashton should be paid a contingent fee, the same to be computed upon the taxes and penalties collected, but that such fee should not be paid except from the penalties so collected. Various contingencies were set forth upon which the contingent fee was payable, the lowest percentage being fifteen percent (15%) of the tax and penalty where there was one penalty, and scaling upwards of twenty percent (20%) where there were two penalties, and twenty-five percent (25%) where there were more than two, with the further provision that if in any six months' period voluntary settlement was made with the county treasurer through the State's Attorney's office, where the sum received exceeded \$150,000, then Ashton was to receive as further fee a sum equal to five percent (5%) of such excess, with the provision that in computing the amount due under the five percent (5%) clause the sums collected either by the State's Attorney or Ashton by suit or foreclosure should not be included. Claims for the regular monthly charges were to be paid on Ashton's verified statement and settlements were to be made as specified. It provided that the board of commissioners reserved the right to determine the basis of settlement with the property owner and the amount of penalty to be paid in cases where there was an adjustment for less than the total allowed by statute. It was stated that the contract should be effective as of May 15, 1931, and should terminate on November 30, 1932, unless renewed by the county board and said attorneys.

On May 25, 1931, Henry M. Ashton addressed a communication to the board, which referred to the resolution of May 22 and stated that he accepted the employ-

ment on the terms outlined and would proceed with the work at once. The then State's Attorney approved the resolution as to form.

On April 16, 1932, Ashton addressed another communication to the board suggesting that Edward M. Winston, who is one of the appellants herein, be authorized to carry out Ashton's contract from that date until December 1, 1932. The request was approved April 27, 1932, and Edward M. Winston was given full power and authority to represent the board "in all suits heretofore brought under said contract and to carry such suits to completion; and authority is also given hereby to the said Edward M. Winston to begin and prosecute with full power as attorney for this Board all other suits and proceedings which he may deem necessary and desirable to collect delinquent taxes due and unpaid on real estate in Cook county under the terms and conditions as to compensation which were provided in the contract with Henry M. Ashton."

On November 22, 1932, the board adopted a further resolution which recited "That the authority heretofore granted by resolution of this Board to Edward M. Winston to represent said Board is hereby extended to March 15th, 1933, with full power to begin any suits for collecting of delinquent taxes which he may deem desirable during the said period and to prosecute them to completion, and that the terms and conditions set forth in the original contract with Henry M. Ashton, dated May 15, 1931, and the resolution of authority to Edward M. Winston, dated April 27, 1932, shall be in force except as herein modified."

At the November election, 1932, another was elected to succeed the former State's Attorney and on July 22, 1933, he filed an information in equity in the circuit court of said county in which he made Ashton, Winston and the several members of the board of commissioners parties defendant. It was alleged that Ashton and Winston had received \$20,000 pursuant to said contract, that another item of \$7263.92 had been audited, county warrants issued and would be delivered unless enjoined by decree of court. It was charged that the several resolutions adopted by the board were *ultra vires*, that the contract was illegal and void. The prayer was that Ashton and Winston be required to account for the \$20,000 previously received.

that payment of the \$7263.92 be enjoined and that plaintiffs be granted general relief.

The county commissioners, Ashton and Winston filed separate pleadings. An issue was raised on a motion to dismiss as to whether it was within the powers and duties of the State's Attorney to bring an action on behalf of the People against the county commissioners of the county while he was the legal adviser of such board. The motion was sustained and the cause dismissed. On direct appeal (*People v. Ashton*, 358 Ill. 146) the decree was reversed and the cause remanded with directions.

After the cause was redocketed and the mandate filed, Ashton and Winston each filed an answer. Winston also filed a counterclaim to recover the fees due on the contract. He claimed the amount due was in excess of one and one-half million dollars. The State's Attorney's motion to strike Winston's answer and counterclaim was sustained and Winston elected to stand by his pleading whereupon a final judgment was entered against him. He brings the cause here for review.

Cause No. 27163 is an action at law instituted by Ashton and joined in by Butz against the county of Cook to recover the fees alleged to be due on the same resolutions and acceptances set forth in No. 27169. Winston was made a defendant. This suit was filed June 26, 1939. Butz filed a separate complaint in which it was alleged that during the regime of both Ashton and Winston he carried the burden of drawing the pleadings in all cases filed to enforce the collection of delinquent taxes; that he filed petitions to intervene in certain cases pending in the Federal courts and prosecuted claims in probate court against estates of deceased persons, and that Ashton, Winston, the county of Cook and the then State's Attorney had knowledge that he was performing such services. He claimed that \$1,714,682.92 was due him for fees. A second count was on *quantum meruit*. Winston filed an answer and counterclaim adopting Ashton's and Butz's pleadings.

The State's Attorney's motion to strike Ashton's and Butz's complaint and Winston's answer and counterclaim was sustained and a final judgment entered. Ashton and Butz perfected a joint appeal and Winston brings his cause

here by a separate appeal. They will be referred to as appellants, and the People as represented by the State's Attorney as appellee.

Appellee's motion to dismiss contained nine assignments but the ones urged here as grounds for reversal pertain solely to the power of the board of commissioners to make the contracts in question. Appellants have also pleaded estoppel against the county. It is not claimed that appellants were employed to render service in actions then pending, therefore, the provisions of section 6 of the State's Attorneys Act (Ill. Rev. Stat. 1941, chap. 14, par. 6) have no application.

The law authorizes court action to enforce the collection of delinquent real estate taxes. That appellants filed such suits in the name of the People and as a result of their efforts there was collected and paid into the county treasury more than \$16,000,000 is admitted by the motions to strike. The principal question is as to the power of the board to employ private counsel to conduct such litigation, but appellee's contention that the board was without such power, and that the law confers such power on and makes it the duty of the State's Attorney to render such legal service, necessitates an examination of the law as to the powers of the board and the State's Attorney in such matters.

Section 7 of article X of the constitution provides that the "county affairs of Cook county shall be managed by a board of commissioners of fifteen persons * * * in such manner as may be provided by law." The fullest meaning that can be given to such language is that it creates the board of commissioners and vests in it the power to manage the county's affairs. The scope and breadth of the phrase "county affairs" is not defined, nor is there amplification as to what authority the board may exercise and be within the scope and meaning of the word "manage." It is therefore necessary to look to the legislative enactments for the power that has been delegated to the board in the management of county affairs and determine whether the power here exercised was conferred by statute. *Dahnke v. People*, 168 Ill. 102.

By section 22 of the Counties Act (Ill. Rev. Stat. 1941, chap. 34, par. 22,) a county may sue or be sued, and by

section 23 it is directed that "the powers of the county as a body corporate or politic, shall be exercised by a county board, to-wit: * * * in the County of Cook, by a board of county commissioners, pursuant to section 7 of article X of the constitution." Other provisions pertaining to the powers of the board are found in subparagraph 3 of section 24, which directs that the board has power "to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." Subparagraph 2, section 25, gives the board authority to manage the county funds and county business, and by subparagraph 5 of the same section it is given authority to levy and collect taxes for county purposes. By section 33 of the Counties Act it is made the duty of county boards "to take and order suitable and proper measures for the prosecuting and defending of all suits to be brought by or against their respective counties, and all suits which it may become necessary to prosecute or defend to enforce the collection of all taxes charged on the state assessments."

Section 22 of article VI of the constitution creates the office of State's Attorney and provides for his election. Section 32 of the same article refers to the residence, the performance of the duties of the State's Attorney and other officers and the manner in which vacancies in any of such offices may be filled. It is provided that "all officers, [which includes State's Attorneys] where not otherwise provided for in this article, shall perform such duties and receive such compensation as is or may be provided by law." It will be observed that these constitutional provisions do not prescribe the specific duties of the State's Attorney. It has been held that the State's Attorney is an officer provided for by the constitution and that he is a county officer. (*Cook County v. Healy*, 222 Ill. 310.) Section 5 of the State's Attorneys Act (Ill. Rev. Stat. 1941, chap. 14, par. 5) directs it shall be the duty of the State's Attorney "to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his county, in which the people of the state or county may be concerned," and second, "to prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing

to the state or his county, or to any school district or road district in his county, * * * which may be prosecuted in the name of the People of the State of Illinois."

By the latter provision the duty to prosecute all actions and proceedings for the recovery of revenues and penalties is expressly imposed on the State's Attorney of the county where the default occurred. By section 33 of the Counties Act, the duty is imposed upon the county board to take and order suitable and proper measures for the prosecution of all suits which it may be necessary to start to enforce the collection of taxes charged on the State assessment. The general subject matter of these two statutes, so far as pertinent here, is the collection of delinquent taxes. The former contains the express direction imposing the duty upon the State's Attorney to prosecute such actions. This is in keeping with the purpose for which the office of State's Attorney was created. He is the attorney and legal adviser of the county officials in all matters pertaining to the official business of the county, but his powers and duty pertain solely to those matters in which a knowledge of the law is required. Section 33 of the Counties Act contains no express authorization empowering it to employ private attorneys to institute such proceedings. If any such power is conferred it could arise only by implication.

The rule is that where there is to be found in a statute a particular enactment, it is to be held operative as against the provisions on the subject either in the same act or in the general laws relating thereto. *Robbins v. Lincoln Park Commissioners*, 332 Ill. 571; *Handtofski v. Chicago Consolidated Traction Co.*, 274 Ill. 282; *City of Chicago v. M. & M. Hotel Co.*, 248 Ill. 264.

But we do not regard these statutes as being in such conflict that a rule of construction must be adopted which accepts one and rejects the other. All statutes relating to the same subject must be compared and so construed with reference to each other that effect may be given to all the provisions of each, if it can be done by any fair and reasonable construction. It is presumed that the several statutes relating to one subject are governed by one spirit and policy and that the legislature intended the several statutes to be operative and harmonious. (*Ketcham*

v. *Board of Education*, 324 Ill. 314.) The direction in section 33, that the county board shall take and order suitable and proper means for the prosecution of suits brought to enforce the collection of taxes, evidently means that the board, as the governing agency of the county in charge of expending the county's funds, has the duty of meeting the expenses necessarily incurred in such litigation. Such duty is similar to the general duties of the board and the purposes for which the board was created by the constitution. It is in accord with its functions generally as outlined by statute. The performance of such a duty is in a field foreign to the field in which the State's Attorney performs his duty. The duty resting upon the State's Attorney to prosecute suits for the collection of delinquent taxes requires performance in a field outside the scope of the duties of a county board. It seems that the legislature intended to preserve a relationship between the duties of the board and those of the State's Attorney which is not dissimilar from that of attorney and client.

It is alleged in appellants' pleadings that the occasion for employing private counsel was created by the increase of the number of defaults in the payment of taxes and that the State's Attorney did not have the time, in connection with his other duties, to institute such suits. County boards can exercise only such powers as are expressly given by law or such as arise by necessary implication from the powers granted or are indispensable to carry into effect the object and purpose of their creation. (*Marsh v. People*, 226 Ill. 464; *County of Cook v. Gilbert*, 146 Ill. 268.) No provision is made in the law which authorizes a board to employ private counsel in collection of delinquent taxes under the emergency pleaded, even though the State's Attorney approves the contracts as to form and gives his silent acquiescence to the procedure adopted. His consent cannot operate to supply the board with a power which the legislature has seen fit to withhold.

Appellants rely upon cases such as *Mix v. People*, 116 Ill. 265, and *Ottawa Gas Light and Coke Co. v. People*, 138 Ill. 336, as holding that a county board has authority to employ private counsel to enforce the collection of delinquent taxes. There are statements in the opinions in

those cases which appear to support appellants' contentions, but the ruling in such cases must be considered in the light of the facts. In each of them the authority of private counsel to represent the plaintiffs was questioned by a taxpayer against whom the suit to collect had been instituted, while in these cases it is a direct attack upon the power which the board undertook to exercise. This distinction was noted in *People v. Straus*, 355 Ill. 640. That was an action to foreclose a tax lien started by one of the appellants in these cases as attorney for the People serving under the contracts in question. His authority to appear in such capacity was questioned. In noting that it was a collateral attack on his authority raised by a taxpayer it was said: "Numerous cases are cited tending to show that it was the proper function of the State's Attorney to prosecute this case, and there is much argument for the purpose of showing that the contract between the county commissioners and the solicitor who appeared for the People in the trial court is unconscionable, contrary to public policy and void. The principal case relied on in this connection is *Fergus v. Russel*, 270 Ill. 304. That case is not in point on this inquiry, because the employment was there directly attacked and not brought collaterally in issue as is attempted here." The statements in those cases which are counter to the conclusions reached are not adhered to.

The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer. (*Fergus v. Russel*, 270 Ill. 304; *Stevens v. Henry County*, 218 Ill. 468; *Hope v. City of Alton*, 214 Ill. 102.) The contracts of employment under which appellants claim were *ultra vires* and void.

Appellants contend that even though the contracts are *ultra vires* and void, the county having received the benefits of their services by the collection of more than \$16,000,000 of delinquent taxes, it is now estopped to deny its liability to pay for such services. They cite and rely upon cases

such as *Hall v. County of Cook*, 359 Ill. 528. Such contention ignores the distinction made in many cases between contracts of a municipality which are *ultra vires* for want of power to make and which are wholly void, and those cases where the municipality had the power to act but by reason of an improper exercise of the power the contract is void. The *Hall* case and other cases are of the latter class.

In *Hope v. City of Alton*, 214 Ill. 102, an ordinance of the city created a legal department and prescribed its duties. While such ordinance was in full force, the city council adopted a resolution employing a private attorney to appear in litigation in which the city was a party. In an action by such attorney to recover for compensation for such services, this court held that the act of employment was void and that the city was not estopped from defending on the grounds that it had no power to make the contract. This case is controlling here. The principle has been often stated as follows: Everyone is presumed to know the extent of a municipal corporation's control over its public funds and such corporation can not be estopped to aver its incapacity when an effort is made to enforce against it a contract which provides for payment from such funds when it had no power to make such an agreement. *People v. Parker*, 231 Ill. 478; *May v. City of Chicago*, 222 Ill. 595; *City of Danville v. Danville Water Co.*, 178 Ill. 299.

Appellants also contend that they should be permitted to recover on a *quantum meruit*. Such a recovery is founded on the implied promise of the recipient of services or material to pay for something which he has received that is of value to him. Such principle can have no application in this case for the reason that the contracts were wholly void and created no rights and imposed no obligations. They come within the principle of law that where the legislature has withheld a power it is the same as though the exercise of the power was prohibited by law. (*Continental Ill. Nat. Bank and Trust Co. v. Peoples Trust and Savings Bank*, 366 Ill. 366.) To permit recovery of compensation in these cases on a *quantum meruit* would, in legal effect, give sanction to the giving of public funds to private use for the performance of duties which the

law imposed upon the State's Attorney and for which he receives the salary fixed by law.

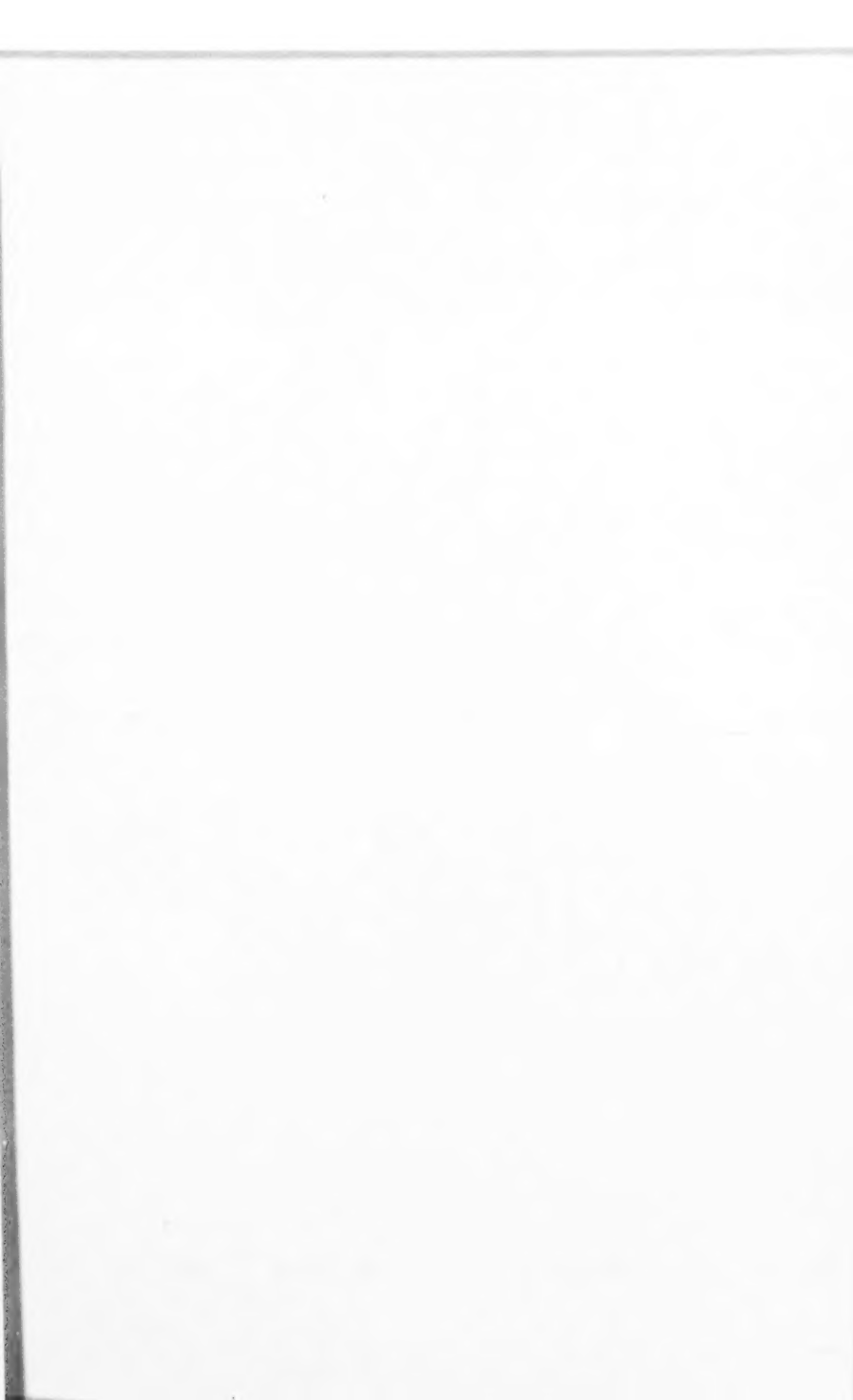
Appellee contends that there was no appropriation ordinance in existence when the contract was made covering the liability incurred and that, therefore, the contract was void. Appellants' pleadings contained allegations of facts relative to items of the appropriation ordinance for the year in which the contract was made, and it is argued that the motion to dismiss admitted these facts which it is claimed are sufficient to show the liability incurred was covered by proper appropriation. The contracts having been declared void under the views expressed, therefore it is not necessary to consider the question of the sufficiency of the facts pleaded to show a proper appropriation.

The decree in No. 27169 sustaining the motion to strike appellants' answer and counterclaim was correct and will be affirmed, but as the appellee asked for certain other relief against the defendants and for the purpose of preserving the rights and questions under that branch of the case, the cause is remanded to the circuit court with directions to proceed as to such matters. The judgment sustaining appellee's motion to strike appellants' pleading in No. 27163 was correct and is affirmed.

No. 27163, Judgment affirmed.

*No. 27169, Decree affirmed, and
cause remanded, with directions.*





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APR 13 1944

CHARLES ELMORE DROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 786

EDWARD M. WINSTON,

Petitioner,

VS.

THOMAS J. COURTNEY, State's At-
torney, COUNTY OF COOK, a Mun-
icipal Corporation of the State of
Illinois, and others,

Respondents.

Petition for Writ of Cer-
tiorari to the Supreme
Court of the State of
Illinois.

There heard on appeal from
the Circuit Court of Cook
County.

**REPLY TO ANSWER TO THE PETITION FOR
WRIT OF CERTIORARI.**

WEIGHSTILL WOODS,

Attorney for Petitioner.

URBAN A. LAVERY,

E. M. WINSTON,

S. J. KONENKAMP,

Of Counsel.

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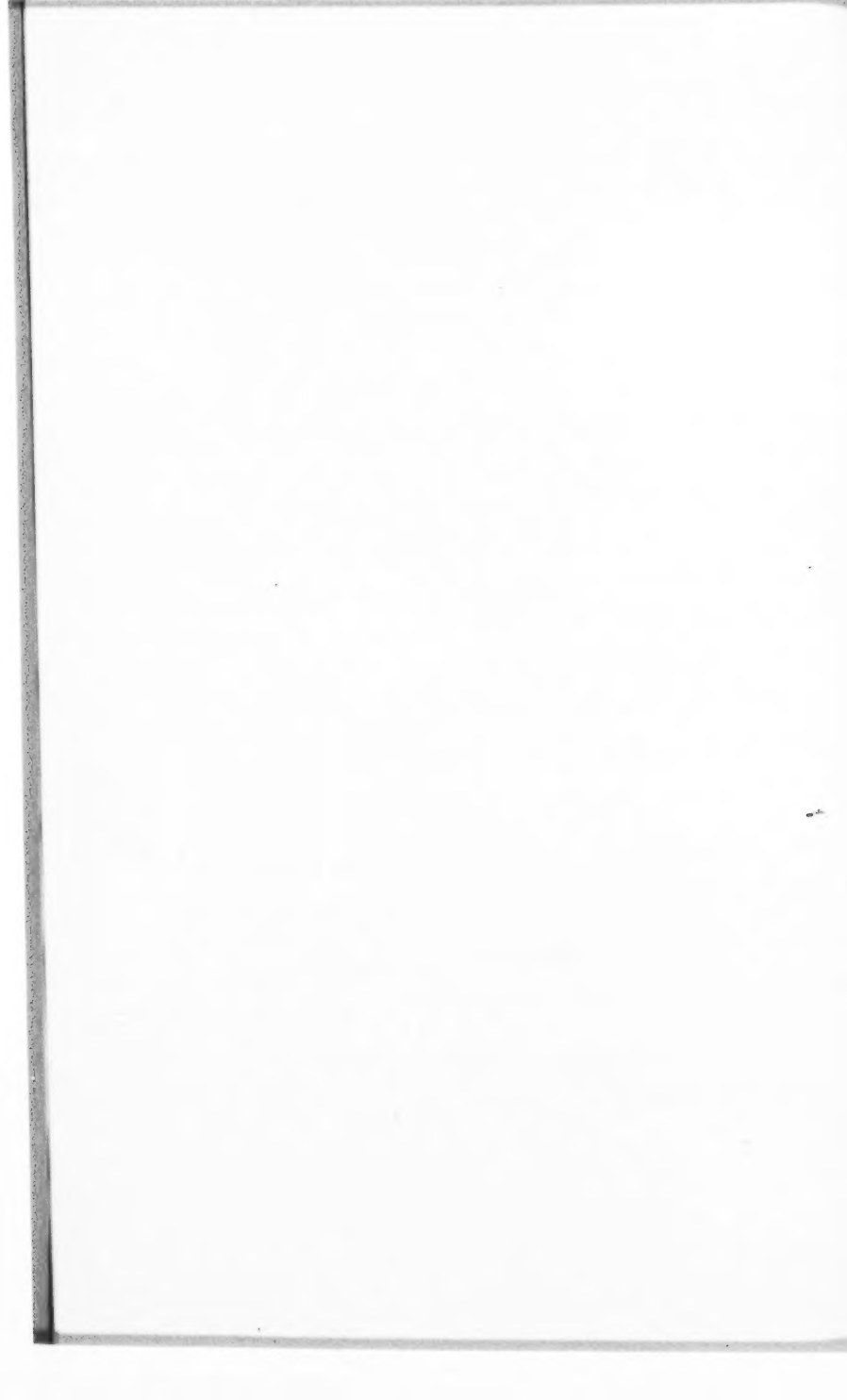
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IN THE

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EDWARD M. WINSTON,

Petitioner,

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THOMAS J. COURTNEY, State's Attorney,
COUNTY OF COOK, a Municipal Corporation of the State of
Illinois, and others,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

There heard on appeal from the Circuit Court of Cook County.

REPLY TO ANSWER TO THE PETITION FOR WRIT OF CERTIORARI.

To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner for Reply to the Answer by Respondents; says that there are special and important reasons for a review by writ of certiorari, which are adequately shown by his petition filed in this Court. That substantial questions under protection of the constitution of the United States were raised and decided in the Illinois Courts in this case.

That the the final decision by the Supreme Court of Illinois was *ex post facto* legislation, and did deprive the petitioner of vested rights without due process of law, without equal protection of law, and did impair the obligation of the contract made with petitioner by the County of Cook and State of Illinois, and said rulings by the Illinois Courts decided Federal questions in conflict with applicable decisions of this Court and departed from the usual and accepted course of judicial procedure.

Wherefore your petitioner asks again that the writ of certiorari be granted as prayed by his petition.

Petitioner comments upon the brief by the respondents as follows:

I. and III.

Cases cited by respondents are not in point.

To defeat the jurisdiction of this court to review this record now at bar, respondents rely upon the case of *Tidal Oil Co. v. Flanagan*, 263 U. S. 444. In that case at page 450, this Court quoted Section 237 of the Judicial Code as amended February 17, 1922, reading as follows:

“In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, re-examine, reverse, or affirm the final judgment of the highest court of a state, in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made.”

The petitions for rehearing (Tr. 81-158) in the instant case were denied by the Supreme Court of Illinois without any written opinion thereon (Tr. 159).

With reference to that amended statute, the opinion by Your Honors in the *Tidal Oil Company* case, at page 455, made the following ruling:

"It was the purpose of the Act of 1922 to change the rule established by this formidable array of authorities as to the class of cases therein described. The question in such cases could not well be raised until the handing down of the opinion indicating that the objectionable judgment was to follow. This act was intended to secure to the defeated party the right to raise the question here if the state court denied the petition for rehearing without opinion."

Counsel for respondents probably overlooked the fact that in the *Tidal Oil Company* case, there had not been any construction of the state statutes or constitution by the state courts, and consequently no reliance therein by the parties in the legal acts and documents there under review, and consequently there had been no departure by the state courts from a settled construction of the state law established by state decision upon state statutes or constitution prior to the time of the acts upon which the rights were claimed to be based in the *Tidal Oil Company* case.

A like situation exists with reference to the case of *Toole County Irrigation District v. Moody*, 125 Fed. (2d) 498, upon which also respondents place reliance. The opinion in that case at page 500 reads as follows:

"At the time the bonds here involved were issued (1921 and 1922), the Supreme Court of Montana had not decided whether bonds issued under chapter 146 constitute general obligations of the issuing district or merely a charge against the lands within such district."

In that *Toole County* case there was no decision by the court from which a departure could be made by Court action. The contrary is true in the case at bar. There were more than sixty years of Illinois court decisions interpreting the Constitution and the statutes of Illinois pertaining to the subject matter *before the contract at bar was made between the petitioner and Cook County*.

That fact governed that case and completely distinguishes that line of cases from the record and situation now at Bar.

The petitioner is here with the record wherein the Supreme Court of Illinois, by its two opinions and ruling in this case, for the first time, makes departure from the rulings by itself and the Appellate Court of Illinois, as to the established meaning and effect of the constitution and statutes of Illinois, as disclosed by many decisions over a period of more than sixty years, prior to the time that the legislative act and contract by the County Board of Cook County was enacted and the contract now at bar was entered into with this petitioner in the year 1931.

The decisions by the Supreme and Appellate Courts of Illinois during said sixty years, before this contract was made, necessarily became an established part of the statute and constitution of the State of Illinois, many decades before this contract relying thereon. During all of these years and to this date, the legislature of Illinois did not change that meaning and construction of said statutes of the State of Illinois. The sudden departure by the Supreme Court of Illinois, in the instant case, is not a construction or interpretation of the statute and the constitution, but is in fact nothing more or less than outright judicial legislation, and an outright seizure

by the court of legislative power belonging to another branch of the government of the State of Illinois.

In the case of *State of Indiana ex rel. Anderson v. Brand*, 303 U. S. 95 the suit was

“Mandamus by the State of Indiana, on the relation of Dorothy Anderson, to compel Harry Brand, Trustee of Chester School Township of Wabash County, Ind., to continue relatrix in employment as a public school teacher. To review a judgment, 5 N. E. 2d. 531, 110 A. L. R. 778, affirming a judgment sustaining a demurrer to the complaint, relatrix brings certiorari.

“Reversed and remanded.”

In that case at Page 105, this Court stated:

“Until its decision in the present case the Supreme Court of the State had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the act was contractual.”

In that case Your Honors took jurisdiction on petition for writ of certiorari to the State's Supreme Court, and Your Honors decided the case, and reversed the ruling made by the Supreme Court of Indiana.

The final opinion by the Supreme Court of Illinois now under review, states the following language:

“Section 22 of article VI of the constitution creates the office of State's Attorney and provides for his election. Section 32 of the same article refers to the residence, the performance of the duties of the State's Attorney and other officers and the manner in which vacancies in any of such offices may be filled. *It is provided that* ‘all officers (which includes *State's Attorneys*), where not otherwise provided for in this article, *shall perform such duties* and receive such com-

pensation as is or may be provided by law.' *It will be observed that these constitutional provisions do not prescribe the specific duties of the State's Attorney.* It has been held that the State's Attorney is an officer provided for by the constitution and that he is a county officer. *Cook County v. Healy*, 222 Ill. 310, 78 N. E. 623. * * *

"The law is well settled that when the constitution or the laws of the State create an office, *prescribe the duties of its incumbent* and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for *the purpose of performing the duties which were imposed upon such officer.* *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120; *Stevens v. Henry County*, 218 Ill. 468, 75 N. E. 1024, 4 L. R. A., N. S., 339, 4 Ann. Cas. 136; *Hope v. City of Alton*, 214 Ill. 102, 73 N. E. 406. The contracts of employment under which appellants claim were ultra vires and void."

Only the County Board has authority.

By italics above, we emphasize that part of the opinion now under review, which admits the truth of the contention at (A-2) at page 10; and (C-3), (C-4) and (C-5) at page 13; (E) at page 14; (F) at page 15 of brief for petitioner: That the State's Attorney of Cook County is an officer of the county created by the Constitution of Illinois 1870, which does not prescribe for him any duties whatever, and that he has no common law powers or duties, and is not a successor in any sense of the Attorney General of England, or the Attorney General of the State of Illinois, and that he has no powers and no duties other than those which may be prescribed by the legislature of the State of Illinois. And that all powers or duties so prescribed by statute, must be in deference to those powers and duties which by statute and constitution of State of

Illinois, are vested in the County Board of Cook County as the Constitutional Legislative Body for that County. Stated at (A-1), page 10 of petition, Section 7 of Article X, Constitution of 1870, (makes provision for the government of Cook County different from the other 101 Counties of the States), thereby giving Cook County real home rule, as follows:

“Sec. 7. Cook County, government of

“The county affairs of Cook County shall be managed by a board of commissioners of fifteen persons, ten of whom shall be elected from the City of Chicago, and five from towns outside of said city, in such manner as may be provided by law.”

When the legislature of Illinois, pursuant to that constitutional provision, stated in detail certain duties of the County Board of Cook County, which are set forth at (A-3) page 10 to (B-3) page 12 of brief for petitioner. Those powers and duties are not in any sense or manner taken from the State's Attorney, because he never had them. To give them to him would be in derogation of the express language of the constitution at section 7, Article X, quoted above.

The limited nature of the powers and duties of the State's Attorney of Cook County was thoroughly canvassed by the Supreme Court of Illinois, in the case of *People v. Newcomer*, 284 Ill. 315, where the court discussed the history of the office of Attorney General of England, and the history of the office of Attorney General of Illinois, and definitely stated that the State's Attorney of Illinois did not possess any of their powers, and was not a successor to them, but that the State's Attorney of Cook County had only such duties and powers as may be provided by statute, in keeping with the Constitution of Illinois vesting sovereignty in other persons and authorities. That opinion by the Supreme Court of Illinois in *People*

v. *Newcomer* is too long for quotation here, but the conclusion of that opinion at page 323 reads as follows:

"The court will not consider the powers of the Attorney General of the state, who under our Constitution is a state officer and a member of the executive department of the state representing the sovereignty of the people, but does not regard the powers of the state's attorney as co-extensive with those of the Attorney General, who is a chief law officer of the state and head of the legal department. *Fergus v. Russel*, 270 Ill. 304. The state's attorney is a county officer elected for and within a county to perform his duties therein and is by statute charged with certain duties. *Cook County v. Healy*, 222 Ill. 310."

Filing this suit was ultra vires any power vested in State's Attorney.

We have shown at page 13 of brief for Petitioner:

"There was no common law 'States Attorney'. There are no common law powers of States Attorney. The States Attorney provided for by the Constitution for Illinois 1870, was an entirely new office. The Constitution does not specify any duties for that office".

These statements are confirmed by the case of *People v. Newcomer*, 284 Ill. 315 as quoted hereinabove. Said constitutional provision (Article VI, section 22, Tr. 57, creates the office of State's Attorney as part of the Judicial division of the powers of government in Illinois. At page 10 of our Petition we relied upon Article III of the Constitution of Illinois 1870, which reads as follows:

"The powers of government of Illinois are divided into three distinct departments: the legislative, executive and judicial: and no person or collection of persons being in one of those departments shall exercise any power properly belonging to either of the others."

The scope of the power to act must be traced to the constitution itself: *Greenfield v. Russell*, 292 Ill. 392 at 400.

At page 7 the brief for respondents says that Thomas J. Courtney as State's Attorney filed this instant information in equity against Winston and others to stay payment of compensation under his contract with Cook County, the information charging that the contract was ultra vires the power of Cook County. This statement as to party plaintiff—Thomas J. Courtney as State's Attorney—is confirmed by the record (Tr. 2; Rec. 44), and by both of the opinions of the Supreme Court in this case.

At page 13 of brief for Petitioner, it is shown by the case of *Biggins v. People*, 96 Ill. 481, that the State's Attorney has no authority to proceed in equity in any matter about taxes or revenue, unless a specific statute shall so provide. There is no statute to authorize him to file the instant information in equity as *State's Attorney*.

On the contrary the only enabling statute in that regard (Chapter 102, Section 12 of Illinois Revised Statutes) authorizes the Attorney General of Illinois so to act. That officer has not at any time in any court had any part in the conduct of this suit. Thereby it is shown again that this suit is mere oppression of the citizen by arbitrary assumption of executive power of government, which never did have any statutory nor other warrant.

II.

The Act of the Illinois Supreme Court in changing, after sixty years, its construction and interpretation of the Illinois Constitution and Statutes, was a downright departure which did operate to impair the operation of the contract made in 1931 with petitioner.

It is difficult to understand what is meant by the argument of respondents under Point II at pages 10 to 12 of their Answer. All they say is that the Supreme Court of Illinois is consistent with itself in its two opinions in this very case in this very record. Petitioner does not contend to the contrary. Petitioner has brought here for reversal on this record both opinions in 358 Ill. 146, and 384 Ill. 283. Petitioner has shown in his petition (Pages 14 and 17) that the first opinion was interlocutory and not final and reviewable in this court, until the second opinion was filed and adhered to. *Georgia Railway and Power Co. v. Decatur*, 262 U. S. 432 at 436. Decided June 4, 1923.

The result is that respondents admit, *as they must*, that the Supreme Court of Illinois only in this record and in these two opinions, have departed boldly and completely from all prior ruling by Illinois Courts which had been rendered for a period of sixty years, establishing the meaning of constitution and statutes on which petitioner relied and made his contract, *before the contract in this record was made*. In reliance upon those established decisions the contract was made between petitioner and the County of Cook in the year 1931.

I.

For the foregoing reasons the citation by respondent at page 9 of their answer of the case of *Cleveland and Pittsburgh Railroad Company v. City of Cleveland, Ohio*, 235

U. S. 50, has no bearing whatever upon the record in this case. Furthermore, that decision was in the year 1914, many years before the amendment to section 237 of the Judicial Code was made in 1922.

The most recent textbook discussion is as follows: Vol. 10, *Cyclopedia of Federal Procedure*, Chapter 57; at page 383 (Edmunds-Callaghan Edition 1944):

“* * * a claim of federal right then presented may be in apt time under the special circumstances of the case, as where the asserted denial of the right resulted from the action of that court then taken which the claimant was not bound to anticipate and against which he was not bound to take other precautions at an earlier stage of the case; (47. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, 53 Sup. Ct. 145; *Saunders v. Shaw*, 244 U. S. 317, 61 L. Ed. 1163, 37 Sup. Ct. 638.) and a federal question may be regarded as made in apt time where it raised in the state appellate tribunal and there decided adversely to the federal claim on its merits and not on the ground that it was not raised in the trial court below. (48. *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. Ed. 1072, 20 Sup. Ct. 93.)”

And further at page 387:

“Only the questions discussed by the state Supreme Court are reviewed by the federal Supreme Court where the record does not show what, if any, federal questions were presented to the state court. *Northwestern Bell Telephone Co. v. Nebraska State Ry. Commission*, 287 U. S. 471, 80 L. Ed. 810, 56 Sup. Ct. 536.”

And further at page 433:

“* * * Where the federal question was actually dealt with and decided by the highest state court it is not essential that it shall have been passed upon by the trial court. (*Chicago, R. I. & P. R. Co. v. Perry*, 259

U. S. 548, 66 L. Ed. (7. 1056, 42 Sup. Ct. 542.) A claim that a constitutional question was not involved in the state decision because of a waiver before suit cannot prevail to defeat the jurisdiction of the Supreme Court to review the decision where the highest state court deemed it necessary to pass on the question, which was properly made in the suit, and no other legal grounds appear on which its decision against the federal claim can be supported. (8. *Chicago, R. I. & P. Ry. Co. v. Perry*, 259 U. S. 548, 66 L. Ed. 1056, 42 Sup. Ct. 524.)”

And further at pages 437 to 440:

“It is important to keep in mind that the Supreme Court is the sole judge of its own appellate jurisdiction and it is for that court alone to determine whether, accepting the state court’s construction, federal rights or claims are affected thereby so as to give the state judgment the requisite reviewable characteristics. (36. *Ward & Gow v. Krinsky*, 259 U. S. 503, 66 L. Ed. 1033, 42 Sup. Ct. 529, 28 A. L. R. 1207.) The determination of the jurisdiction of the Supreme Court to review a state judgment, including the question whether the judgment possesses the requisite reviewable characteristics, necessarily devolves upon the court alone. (37. *Newport Light Co. v. City of Newport*, 151 U. S. 527, 38 L. Ed. 259, 14 Sup. Ct. 429; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. Ed. 1134, 14 Sup. Ct. 166. The question whether the decision of a federal question by the state court was necessary to the determination of the cause, is itself a federal question which the Supreme Court must decide. *Honeyman v. Hanan*, 400 U. S. 14, 81 L. Ed. 476, 57 Sup. Ct. 350.) Thus, it will decide for itself the existence of a federal question in the case, although the state court decided that none existed, and it will determine for itself all questions as to the operation and effect of the state statute on federal rights or claims and all jurisdictional questions incidental thereto. Where it is asserted that state legislation as construed and applied operates to impair existing contract obligations, the Supreme Court will determine all questions as to the existence,

construction, effect and validity of the asserted contract obligations, and it will inquire into the state decision and determine, not only whether the federal claim was decided in express terms, but whether it was decided in substance and effect, by supporting the decision on nonfederal grounds which are without fair or substantial support. In determining whether the requisite federal question is present in the state decision and was decided by the state court, the Supreme Court will look to the necessary effect of the state decision. (42. *Woodruff v. Mississippi*, 162 U. S. 291, 40 L. Ed. 973, 16 Sup. Ct. 820; *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123, 13 Sup. Ct. 224.) and not to the reasons assigned by the state court for the conclusion reached (42. *Hartford Life Ins. Co. v. Barber*, 245 U. S. 146 62 L. Ed. 208, 38 Sup. Ct. 54, rev'g judgments 269 Mo. 21, 187 S. W. 867, and 268 Mo. 363,

187 S. W. 874; *St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858.) or the form which the state court adopts in passing upon the judgment of the court below (44. *Williams v. Bruffy*, 102 U. S. 248, 26 L. Ed. 135.) or the grounds upon which its decision is based, especially if they appear to be evasive or merely colorable (46. *Rogers v. Alabama*, 192 U. S. 226, 48 L. Ed. 417, 24 Sup. Ct. 257.) or whether it decided the federal question correctly or not. (47. *Bates v. Bodie*, BDE U. S. 520, 62 L. Ed. 444, 38 Sup. Ct. 182; *Andrews v. Andrews*, 188 U. S. 14, 47 L. Ed. 366, 23 Sup. Ct. 237; *Blythe v. Hinckley*, 180 U. S. 333, 45 L. Ed. 557, 21 Sup. Ct. 390.) In determining such questions the court is not limited to consideration of the language of the state decision. The question whether the federal question is sufficiently presented by the pleading of the party asserting must be determined by the Supreme Court independently of the views held by the state court. (49. *Corvington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. 198.)"

The opinions in this case make reference to some rec-

ords of other cases which were decided at the same time. That fact does not make those cases of any importance upon this review. The court records of those cases were and remain separate and distinct at all times. They have not been brought here. Whatever was said about those cases is not now pertinent. The record in case 27169 is the only one brought here from the Supreme Court of Illinois. That record is complete and unabridged for this review.

Public importance of this case.

This is not a political case. We present for review a breach of basic civil rights fully as much as the recent *Texas* case heard in this Court. This case has as wide public interest and importance as had the case of *Brand v. Indiana* mentioned above. As shown at pages 36 and 38 of Petition and Tr. 100-137, the County Board continuously and currently ever since the Year 1870 when the Constitution was adopted, has employed and has paid many attorneys for many sorts of legal services entirely outside of the Staff who are permanently employed as full time Assistant State's Attorneys.

Not only all Members of the County Board for more than seventy years, but also all such employees for that period, are placed under the cloud of these opinions brought here for review. See Tr. 110. Furthermore the future conduct of the county business for more than four million people is directly involved.

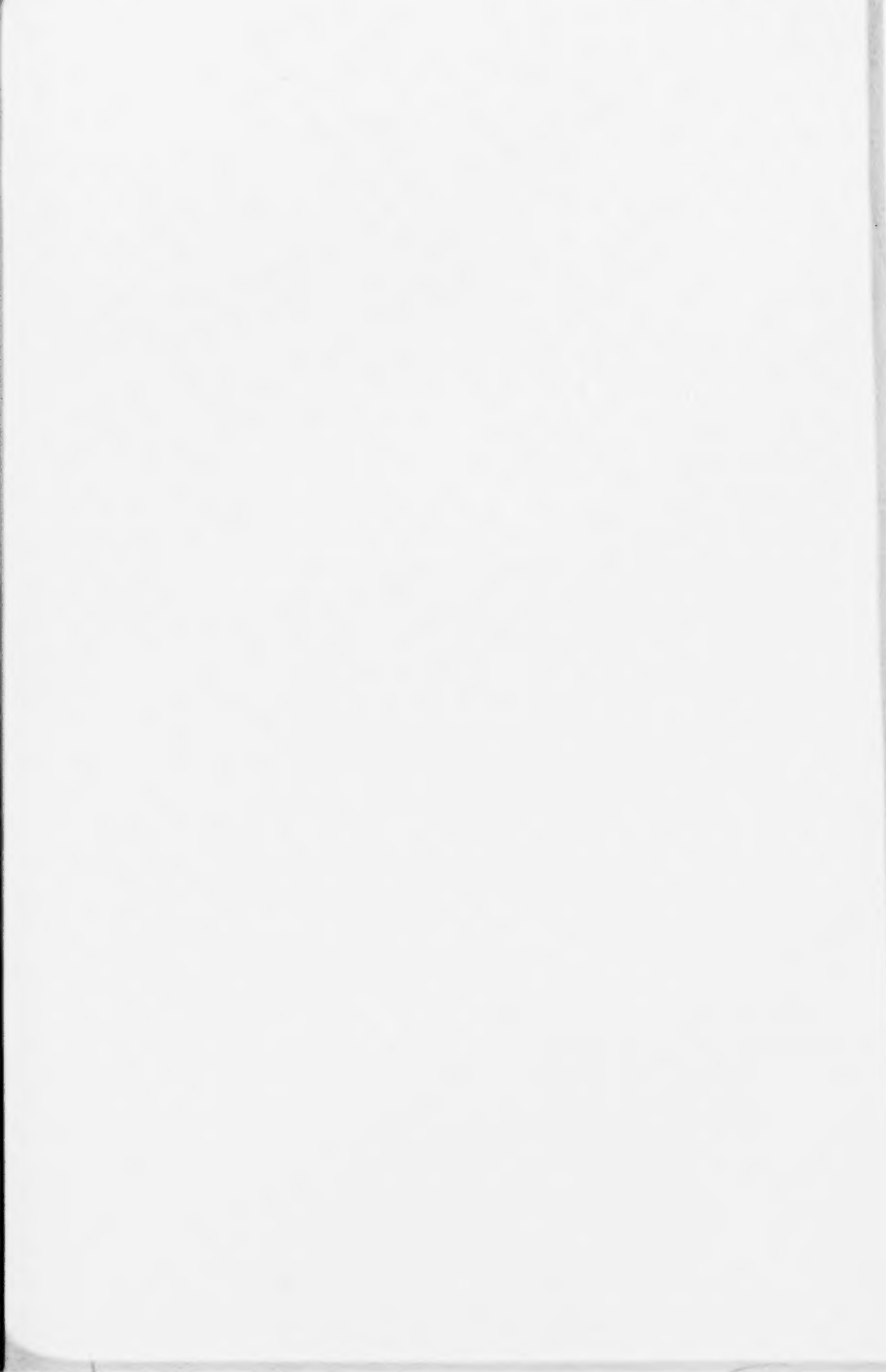
Therefore Petitioner renews the prayer of his Petition.

Respectfully submitted,

WEIGHSTILL WOODS,

Counsel for Petitioner.

77 West Washington Street,
Chicago (2), Illinois.





(21)

Office - Supreme Court, U. S.

FILED

MAY 25 1944

CHARLES ELMORE GROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 786

EDWARD M. WINSTON,

Petitioner,

VS.

THOMAS J. COURTNEY, State's At-
torney, COUNTY OF COOK, a Mu-
nicipal Corporation of the State
of Illinois, and others,

Respondents.

Petition for Writ of Cer-
tiorari to the Supreme
Court of the State of
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There heard on appeal from
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County.

PETITION FOR REHEARING UPON AMENDED PETITION FOR WRIT OF CERTIORARI.

WEIGHTSTILL WOODS,

Attorney for Petitioner.

URBAN A. LAVERY,

E. M. WINSTON,

S. J. KONENKAMP,

Of Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 786

EDWARD M. WINSTON,

Petitioner,

VS.

THOMAS J. COURTNEY, State's Attorney, COUNTY OF COOK, a Municipal Corporation of the State of Illinois, and others,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

There heard on appeal from the Circuit Court of Cook County.

PETITION FOR REHEARING UPON AMENDED PETITION FOR WRIT OF CERTIORARI.

Your order denying certiorari April 24, 1944.

We are advised by the Clerk of this Court that the order denying the petition for writ of certiorari reads as follows:

"The petition for writ of certiorari is denied for failure to comply with paragraphs 1 and 2 of Rule 38 and paragraph 1 of Rule 12. Mr. Justice Rutledge

took no part in the consideration or decision of this application."

Counsel for petition express regret to have been informal in making the application. They hope by this petition for rehearing to comply with all applicable rules of Court.

Your petitioner, Edward M. Winston, prays for a rehearing and a reversal of order April 24, 1944; and that Writ of Certiorari be issued by this Court to review the judgment below of the Supreme Court of Illinois, finally rendered November 11, 1943, affirming a judgment against your petitioner entered by the Circuit Court of Cook County of Illinois, dismissing his answer and counterclaim.

Judgment and Opinion Below.

The opinion of the Supreme Court of Illinois was first filed September 23, 1943. A Petition for Rehearing on the part of your petitioner was duly filed, but was denied by that court November 11, 1943. (Tr. 159.) Another, and separate, Petition for Rehearing (Tr. 100) was duly filed by certain other defendants below (individual members of Cook County Board of Commissioners), but that Petition was "stricken," November 10, 1943, without any reason being given therefor. See detail of record at page 5ff below.

One complete record here.

The opinions by the Supreme Court of Illinois in this case, make reference to some records of other cases which were decided at the same time. That fact does not make those cases of any importance upon this review. The court records of those cases were and remain separate and distinct at all times. They have not been brought here. What-

ever was said about those cases is not pertinent. The record in case 27169 is the only one brought here from the Supreme Court of Illinois. That record is complete and unabridged for this review.

Winston contract of record.

The opinions by the Supreme Court of Illinois are reported as follows: 358 Ill. 146 and 384 Ill. 287.

The judgment of Illinois courts held as invalid and of no avail a formal record contract (Tr. 10) for legal services, between your petitioner, an attorney at law, and the County of Cook, State of Illinois. Both courts thereby denied all rights of your petitioner under the said contract and held adversely to your petitioner (Tr. 49, 79, and 159) upon certain Federal questions, based on the Constitution of the United States and hereinafter more fully set forth.

Federal Questions.

The major Federal questions in this case are:

A. Whether a written contract made by a County upon its public records in good faith, by authority of specific and County legislation, between a practicing attorney and the County, providing for fees and reimbursement to the attorney for legal services and expenses paid out by him in rendering legal services in the courts for the collection of taxes on real estate, is valid and enforceable, and is protected from impairment by the Constitution of the United States. :

B. Whether destruction by a State Court of such a contract is not forbidden by those provisions of the Constitution of the United States which prohibit impairments of contracts; which prohibit *ex post facto* laws and decisions of States; which prohibit the taking of vested and estab-

lished contract rights or other private property; which prohibit the taking of private property for public use, and which prohibit a State from denying to the citizen the equal protection of the law, on any grounds whatever.

C. Whether the license and franchise held by Winston for over fifty years to practice law and thereby earn a livelihood for himself and family, may be substantially changed in scope by sudden decision by Supreme Court of Illinois in 1943 to reverse the established law of Illinois whereunder private attorneys had been employed by counties for all manner of civil and tax litigation, pursuant to definite authority shown since 1870 by the Constitution as to Cook County, and by many decisions of Illinois Courts discussed below at page 36ff

The foregoing Federal questions are of such general public importance, and are particularly of such grave personal importance to your petitioner, that they should be reviewed by this Court. Particularly is that so because the said rulings made by the courts of Illinois on this record seem to be in clear conflict with decisions and rulings previously made by this Court.

Winston has not claimed and does not claim to supersede any power of the State's Attorney of Cook County. His services were rendered pursuant to legislation by the County Board and pursuant to request by John A. Swanson, State's Attorney, and pursuant to contract made of public record with the County Board. Winston agrees that the County Board had authority to terminate his authority to render further services by new legislation by the County Board, which was done by County Board proceedings dated January 16, 1933.

Statement of the Case by Pleadings

Information in equity.

The contract between Winston and Cook County was placed of record April 16th 1932 (Tr. 8) and was confirmed and extended by acts of record November 22, 1932 (Tr. 10). There was full performance by Winston under this contract until this suit was begun.

At an election held in November 1932, Thomas J. Courtney was elected as State's Attorney for Cook County, Illinois. In December 1932 (as successor to John A. Swanson) he entered upon the duties of that office. An Information in the nature of a bill in equity for injunction was filed July 22, 1933, by "Thomas J. Courtney as State's Attorney for the said County of Cook for the people of the State of Illinois, and in the name and by authority thereof, and on the relation of himself as a resident and taxpayer of said County of Cook in behalf of himself as such taxpayer and other taxpayers of said County similarly situated." (Tr. 1.) An amended Information and thereafter a second amended Information were filed (Tr. 2-16). Winston and all members of the County Board, defendants named in said Informations, filed demurrers which were sustained by the Circuit Court by order entered December 15, 1933 (Tr. 21-22). The State's Attorney elected to stand upon said amended Information and thereupon the same was dismissed (Tr. 22).

By opinion on the first appeal (*People ex rel Courtney v. Ashton*, 358 Ill. 146, 148) that Supreme Court stated the substance of the Information as follows:

"The people of the State of Illinois, on the relation of Thomas J. Courtney, State's Attorney of Cook County, and on his relation individually as a resident

and taxpayer of that County, filed in the Circuit Court of Cook County two Informations against the members of the Board of Commissioners of Cook County, the County Treasurer, the County Clerk, and certain attorneys therein named, as defendants, seeking to enjoin the payment to the attorneys of county funds under alleged contracts entered into between the County Board and those attorneys.

* * * * *

"The Informations averred that Courtney is the State's Attorney of Cook County, and that on the 22nd day of May, 1931, and on June 6, 1932, the Board of Commissioners, without power or authority, went through the form of passing resolutions which are set out in the Information, attempting in case No. 22412 to employ Henry M. Ashton and others to prosecute suits and collect delinquent real estate taxes and to authorize him to appear on behalf of and represent the people of the State and the County of Cook as attorney and solicitor, and fixed his compensation on a contingent basis. By amendment Edward M. Winston was substituted for Ashton. * * * The Informations allege that these contracts were *ultra vires* the power of the board and null and void. * * *

And that Supreme Court stated the defense as follows:

"The defendants (Ashton-Winston and all members of the County Board) filed a general and special demurrer to each of the Informations, which demurrers were sustained, and, plaintiff in error abiding the Informations, they were dismissed." (P. 149.)

On that appeal the cause was reversed by Supreme Court of Illinois, in the case of *People v. Ashton*, Cause 24212, and remanded to the Circuit Court of Cook County, with directions to overrule said demurrer (Tr. 22). Thereafter Thomas J. Courtney on April 19, 1935 filed his amendment and supplement to the aforesaid amended Information (Tr. 22-25).

Challenge by State's Attorney to Winston Contract.

By said various Informations Thomas J. Courtney as said informant sought to have declared *ultra vires*, certain agreements incorporated in Legislation adopted by said County Board, employing said Ashton and said Winston as attorneys and counsellor-at-law, to prepare and file and prosecute before the Circuit and Superior Courts of Cook County, civil suits and proceedings to collect delinquent taxes, interest and penalties due on real estate in Cook County.

Winston filed his amended answer and counterclaim to said Information so amended and supplemented, and informant Courtney filed his motion to strike said answer and counterclaim on October 9, 1942 (Tr. 46-48). That motion was sustained by the Circuit Court of Cook County, and a decree entered that said Winston abided his said answer and counterclaim, and reciting "that defendant Winston take nothing by his suit and that the defendant go without day" (Tr. 49.)

Amended Answer and Counterclaim by Winston.

Winston by his pleading (Tr. 63 to 73), denies that said acts of the County Commissioners were *ultra vires* the power of the Board, and denies that the contracts for his legal services are null and void, and denies that at the time of the acts referred to no appropriation therefor was previously made, but on the contrary avers that there were a number of appropriations made by the County Board during the first quarter of the then fiscal year which were applicable to the contracts with Ashton and Winston and that said contracts were made with full power and authority of law.

The amended answer and the counterclaim proceed to challenge the Information and its language in detail not material to this review (Tr. 63-70) and shows that the action by the County Board was in due course of county business; become urgent under the stress of depression years and "tax payers strike."

The amended answer and counterclaim further avers (Tr. 70, 71) that pursuant to the said contracts, Winston in good faith put in many months of arduous professional legal labors both on the part of himself and of others under his supervision and to whom he is liable and expended large amounts of money and filed 818 suits for the collection of such delinquent taxes, penalties, costs and for the foreclosure of liens for such delinquent taxes and paid to the County moneys so collected or caused to be collected, aggregating more than Sixteen Million Dollars (358 Ill. 149). That there is due him for his services rendered under the contracts substantial compensation. (Tr. 71.)

Amended answer and counterclaim further aver (Tr. 71) that the County received the benefit of said labors and expenditures by Winston and that the County of Cook and the Board of Commissioners and said Thomas J. Courtney are and each of them is and should be estopped from asserting or claiming that the contracts were or are invalid or that he, Winston, is not entitled to receive consideration therefor.

Amended answer and counterclaim further avers (Tr. 72) that before entering into the contracts the members of the County Board took counsel with Hayden Bell, who was then County Attorney for Cook County, with John A. Swanson who was then State's Attorney, and with the Honorable Denis E. Sullivan, who was then one of the

Judges of the Superior Court of Cook County. That each of them advised the County Board that the contracts were valid and legal and proper. That the County Board acted upon such legal advice in entering into the contracts with Ashton and Winston.

Amended answer and counterclaim further avers (Tr. 72) that on the 13th day of June, 1939, the County Board and Winston entered into an accounting whereby a definite sum was found as the balance due him. That such accounting constituted an account stated. That Winston demands payment for the same, with legal interest thereon.

Amended answer and counterclaim (Tr. 50 to 54) invokes particularly Section 7 of Article X of the Constitution of the State of Illinois, which makes it the duty of the County Board to manage the county affairs. And it invokes sundry statutes of Illinois. Some of them are quoted below at the Appendix beginning on page 52. See also page 24.

Amended answer and counterclaim further avers (Abst. 56, 57) that in the numerous cases which Ashton and Winston commenced and prosecuted, the same were pending for sufficient lengths of time for the court in each case to take and have knowledge that the proceedings were conducted for and on behalf of the County by Ashton and Winston respectively; by permitting, sanctioning and approving the acts in such cases of Ashton and Winston, respectively, while the same were so pending the court in such numerous cases in each instance by such acquiescence in effect appointed Ashton and Winston, respectively, as a competent attorney to prosecute such causes and proceedings, and the County and the County Board and the State's Attorney of Cook County then and now were and are estopped from setting up a claim that Ashton and Winston, respectively,

were not properly and lawfully acting as such attorney with the same power and authority in relation to such causes or proceedings as the Attorney General or State's Attorney would have had if present and attending to the same; that because of the inability and unwillingness of the then State's Attorney of Cook County it became and was the power and the duty of the County Board and of the County of Cook to provide and arrange to collect unpaid taxes as in and by the contracts with Ashton and Winston provided and authorized.

The fact allegations set forth by the amended answer and counterclaim of Winston (being admitted as true by the State's Attorney motion to strike) constitute the factual background of this case (Tr. 63-73).

How the Issues were Decided.

On October 23, 1942 the Circuit Court of Cook County sustained the motion of the State's Attorney to strike Winston's amended answer and counterclaim, and found as matter of law that the contracts are void; for the reason asserted that the County Board had no power or authority to contract with Ashton or Winston to perform the legal services, as set forth in the aforesaid resolutions adopted by said Board of Commissioners; on the ground that the sole and exclusive power to commence and prosecute suits and proceedings for the recovery of delinquent taxes and interest and penalties, is vested in the State's Attorney of Cook County. The decree further dismissed the counterclaim filed by Winston and ordered that the County of Cook go hence without day (Tr. 49). That decree was affirmed by the Supreme Court of Illinois and rehearing denied November 11, 1943. All those orders form the matter brought here for review and reversal (Tr. 159-160).

In the Supreme Court of Illinois, these Errors Were Relied Upon for a Reversal of the Order and Decree of the Trial Court.

(a) The court acted contrary to Statute and the Constitution and prior decisions as herein stated, in not sustaining the validity of the contracts here involved, and erred by ordering and decreeing that said answer by Winston be stricken and that his counterclaim be dismissed.

(b) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in holding that the contracts and undertakings set forth in the legislation adopted by the Board of Commissioners of Cook County were *ultra vires* and beyond the power of said County Board.

(c) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in holding that the County of Cook was not liable for the services rendered and those moneys expended by Winston, in performing his contract and agreement with said County Board of Commissioners.

(d) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in not holding that the County of Cook was estopped, after receiving the benefit of the services rendered and the money expended by Winston in the performance of said contracts from refusing to pay for such services and moneys so expended upon its order and request.

That opinion by the Supreme Court of Illinois, which was filed on September 23, 1943, in support of the judgment order now here under review, expressly names and repudiates its own prior decisions and interpretations of the Con-

stitution and Statutes of Illinois (384 Ill. page 300). Upon those solemn decisions your petitioner and Cook County had acted and performed under contract. Those prior decisions and interpretations will be mentioned in this petition, and are discussed at page 36ff.

Statement as to Jurisdiction in this Court.

The assignment of errors in the record and briefs filed before the Supreme Court of Illinois, and the petitions for rehearing in that Court (tr. 81-158) summarize the Constitutional and Federal questions presented to that Court and to the Circuit Court of Cook County. There was impairment of contract rights vested in your petitioner; and denial of due process of law for protection of said vested property rights, and denial to your petitioner of equal protection and denial of equal application of law. Petition for rehearing was denied by the Supreme Court of Illinois on November 11, 1943. Upon an application to this Court for an extension of time to file this petition, an order was entered in this Court, extending the time. Timely application for review by this Court is made by filing this petition for rehearing. This petition is presented in accordance with Section 237(b) of the Judicial Code as amended, and Rule 38 of this Court as amended.

Indiana ex rel Anderson v. Brand, 303 U.S. 95.

Upon each appeal (1934 and 1943), your petitioner Winston contended before the Supreme Court of Illinois, that the law to govern this case was thoroughly settled by Constitution and by prior statutes and earlier decisions of the Supreme Court of Illinois. On the first appeal (No. 22412 taken by the State's Attorney of Cook County) the Supreme Court of Illinois said:

“A construction of the Constitution is involved, and so, regardless of argument pertaining to other elements of jurisdiction, this Court has jurisdiction, and the motion to transfer will be denied.”

That Court at that time (October 24, 1934) reversed the dismissal order that had been entered against the State's Attorney suit by the Circuit Court of Cook County, and remanded the case to that Court. There being no final order at that date, this record could not then be brought this Court for review. *Georgia Ry. and Power Co. v. Decatur*, 262 U.S. 432. Later (after remandment and further proceeding) the present appeal was taken in the year 1943 to the Supreme Court of Illinois, by your petitioner. This is similar to the following decisions, where this Court took jurisdiction and gave relief, under like circumstances.

Cases mentioned by respondents are not in point.

To defeat the jurisdiction of this court to review this record now at bar, respondents rely upon the case of *Tidal Oil Co. v. Flanagan*, 263 U. S. 444. In that case at page 450, this Court quoted Section 237 of the Judicial Code as amended February 17, 1922, reading as follows:

“In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, re-examine, reverse, or affirm the final judgment of the highest court of a state, in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made.”

With reference to that amended statute, the opinion by

Your Honors in the *Tidal Oil Company* case, at page 455, made the following ruling:

“It was the purpose of the Act of 1922 to change the rule established by this formidable array of authorities as to the class of cases therein described. The question in such cases could not well be raised until the handing down of the opinion indicating that the objectionable judgment was to follow. This act was intended to secure to the defeated party the right to raise the question here if the state court denied the petition for rehearing without opinion.”

The petitions for rehearing (Tr. 81-158) in the instant case were denied by the Supreme Court of Illinois without any written opinion thereon (Tr. 159).

Counsel for respondents probably overlooked the fact that in the *Tidal Oil Company* case, there had not been any construction of the state statutes or constitution by the state courts, and consequently no reliance thereon by the parties in the legal acts and documents there under review, and consequently there had been no departure by the state courts from a settled construction of the state law established by state decision upon state statutes or constitution prior to the time of the acts upon which the rights were claimed to be based in the *Tidal Oil Company* case.

The absence of any prior settled law likewise was the controlling fact in the case of *Toole County Irrigation District v. Moody*, 125 Fed. (2d) 498, upon which also respondents place reliance. The opinion in that case at page 500 reads as follows:

“At the time the bonds here involved were issued (1921 and 1922), the Supreme Court of Montana had not decided whether bonds issued under chapter 146 constitute general obligations of the issuing district

or merely a charge against the lands within such district."

In that *Toole County* case there was no decision by the court from which a departure could be made by Court action. The contrary is true in the case at bar. There were more than sixty years of Illinois court decisions interpreting the Constitution and the statutes of Illinois pertaining to the subject matter *before the contract at bar was made between the petitioner and Cook County*.

That fact governed that case: and that fact completely distinguishes that line of cases from the record and situation now at Bar.

Departure from Established Law.

The petition is here with the record wherein the Supreme Court of Illinois, by its two opinions and ruling in this case, for the first time, makes departure from the rulings by itself and the Appellate Court of Illinois, as to the established meaning and effect of the constitution and statutes of Illinois, as disclosed by many decisions over a period of more than sixty years, prior to the time that the legislative act and contract by the County Board of Cook County was enacted and the contract now at bar was entered into with this petitioner in the year 1931.

The decisions by the Supreme and Appellate Courts of Illinois during said sixty years, before this contract was made, necessarily became an established part of the statute and constitution of the State of Illinois, many decades before this contract was entered into by petitioner and Cook County, relying thereon. During all of these years and to this date, the legislature of Illinois did not change that meaning and construction of said statutes of the State

of Illinois. The sudden departure by the Supreme Court of Illinois, in the instant case, is not a construction or interpretation of the statute and the constitution, but is in fact nothing more or less than outright judicial legislation, and an outright seizure by the court of legislative power belonging to another branch of the government of the State of Illinois, and is arbitrary denial of federal constitutional rights vested in your petitioner as herein stated.

These Cases Support Federal Jurisdiction.

In the case of *State of Indiana ex rel. Anderson v. Brand*, 303 U. S. 95 the suit was

“Mandamus by the State of Indiana, on the relation of Dorothy Anderson, to compel Harry Brand, Trustee of Chester School Township of Wabash County, Ind., to continue relatrix in employment as a public school teacher. To review a Judgment, 5 N. E. 2d. 531, 110 A. L. R. 778, affirming a judgment sustaining a demurrer to the complaint, relatrix brings certiorari. Reversed and remanded.”

In that case at Page 105, Your Honors stated:

“Until its decision in the present case the Supreme Court of the State had uniformly held that the teacher’s right to continued employment by virtue of the indefinite contract created pursuant to the act was contractual.”

In that case Your Honors took jurisdiction on petition for writ of certiorari to the State Supreme Court, and Your Honors decided the case, and reversed the ruling made by the Supreme Court of Indiana.

Coombes v. Getz, 285 U. S. 434 at 441 52 S. Ct. 435 at 436: is another like case where you took jurisdiction and reversed the State court rulings as departures:

“The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon this court; *but that is not so where the contract clause of the Federal Constitution is involved.* In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been affected. *Scott v. McNeal*, 154 U. S. 34, 45, 14 S. Ct. 1108, 38 L. Ed. 896; *Mobile & Ohio Railroad v. Tennessee*, 153 U. S. 486, 492, etc., 14 S. Ct. 968, 38 L. Ed. 793; *Stearns v. Minnesota*, 179 U. S. 223, 232, 233, 21 S. Ct. 73, 45 L. Ed. 162; *Louisiana Ry. & Nav. Co. v. New Orleans*, 235 U. S. 164, 170, 35 S. Ct. 62, 59 L. Ed. 175; *Huntington v. Attrill*, 146 U. S. 657, 684, 13 S. Ct. 224, 36 L. Ed. 1123; *N. O. Waterworks v. La. Sugar Co.*, 125 U. S. 18, 38, 8 S. Ct. 741, 31 L. Ed. 607; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 144, 17 L. Ed. 571; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 443, 17 L. Ed. 173.

“In substance, the contention of respondent here is that the reserved power provision, read into the contract as one of its terms, authorizes an extinction by repeal of the creditor’s cause of action, unless previously reduced to final judgment.”

Likewise you took jurisdiction in the case of *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 53 S. Ct. (1932) 145 at 149:

“* * * The second is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and

another thing for others. *This latter objection the petitioner could not make in advance of the event.*"

And again you gave relief to petitioner in the case of *West Chicago Street Ry. Co. v. Illinois ex rel Chicago*, 201 U. S. 506 at 519-520:

'We come now to consider the questions arising on the record and discussed at the bar.

"1. The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation,—although the opinion of the state court does not expressly refer to the Constitution of the United States,—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently either with the contract clause of the Constitution or with the clause prohibiting the state from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in *Chicago, B. & Q. R. Co. v. People* (recently decided) 200 U. S. 561, 596, 20 Sup. Ct. Rep. 341."

And again this Court enforced the Constitution *Home T. & T. Co. v. Los Angeles*, 227 U. S. 278 at 290 and 291:

"In *Ex Parte Virginia*, 100 U. S. 339, L. ed. 676, 3 Am. Crim. Rep. 547, the case was this: A judge of a

Virginia county court was indicted under the civil rights act for excluding negroes from juries on account of their race, color, etc. The accused applied to this court for a writ of habeas corpus and a writ of certiorari to bring up the record, and a like petition was presented on behalf of the state of Virginia, and both applications were disposed of at the same time. The first issue to be determined was the meaning of the 14th Amendment. The ruling in *Virginia v. Rives* was reiterated, the court saying:

“They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. *Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.* This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it.’

“Answering the claim that there was no power to punish a state judge for judicial action, and therefore that the charge made was not within the 14th Amendment, it was said that the duty concerning the summoning of jurors upon which the charge of discrimination was predicated was not a judicial but merely a ministerial one. It was, however, pointed out that even if this was not the case, as the state statute gave no power to make the discrimination, it was therefore such an abuse of state power as to cause the act complained of to be not within the state judicial authority,

but a mere abuse thereof; and that it was 'idle' under such circumstances to say that the offense was not within the Amendment (p. 348).

"In *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567, a discriminating enforcement in practice of laws which were in their terms indiscriminating was again held to be within the Amendment, the language which we have quoted from *Ex parte Virginia* being reiterated.

"In *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, the enforcement of certain city ordinances was prohibited on the ground that they were within the reach of the 14th Amendment. The court, reiterating the doctrine of *Virginia v. Rives* and *Ex Parte Virginia*, held that this conclusion was sustained from a two fold point of view,—first, the terms of the ordinances, and second, in any event from the discriminatory manner in which the ordinances were applied by the officers."

And in your latest ruling on April 24, 1944 your Honors affirm the foregoing: *Great Northern Life Ins. Co. v. Read*, 64 S. Ct. 873 at 878:

"It may be well to add that the construction given the Oklahoma statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by the state courts. *Chandler v. Dix*, 194 U. S. 590, 592, 24 S. Ct. 766, 48 L. Ed. 1129; *Smith v. Reeves*, 178 U. S. 436, 445, 20 S. Ct. 919, 922, 44 L. Ed. 1140."

An Act of State Attempted by Illinois Courts.

If State Courts are not forbidden by the Constitution to do what Illinois Courts have done in this record, then it follows that any State Court may dispossess and destroy the contract and property rights of any person as against any municipality or State. That will be true no matter what has been the prior decision, or the prior statute, or

the prior State Constitution; and no matter how long may be the course of action of the municipality or State upon which the person relied, as basis for his contract and franchise and property right vested in such person, before the new decision shall announce the departure and new statement of law. In short if this record is allowed to stand we are not merely on the road, but we have already arrived at the time when the European Doctrine of "Act of State" has been fully adopted in this country. Under this new theory made effective by the rulings in this record, the citizen is no longer citizen under the Constitution. He is *subject to the will of current government*. The shield and protection of the Constitution are removed.

Prayer for Relief.

Your petitioner submits that he did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court and Supreme Court of Illinois impaired his contract and took away his property right by arbitrary and capricious decision. That action was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioner prays the allowance of writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

Weightstill Woods,

Counsel for Petitioner.

Supporting Brief For Petitioner.

(A-1) The Constitution of Illinois vests the legislative sovereignty over the County affairs of Cook County in "The Board of County Commissioners of Cook County," by a special section of that constitution.

Section 7 of Article 10, Constitution of 1870.

On the contrary however, in the other 101 Counties of the State, the affairs of such County may be transacted in such manner as the General Assembly may provide.

Sections 5 and 6 of Article 10, of Constitution 1870.

(A-2) That sovereign legislative power is co-ordinate with and beyond the jurisdiction of every Court and State's Attorney and the Legislature of Illinois.

Article III, Constitution of Illinois, 1870.

Cummings v. Smith, 368 Ill. 94, 103.

Ottawa Gas-Light & Coke Co. v. People, 138 Ill. 336, 343.

People v. Czarnecki, 265 Ill. 489.

Kreeger v. Zender, 332 Ill. 519.

Helliwell v. Sweitzer, 278 Ill. 248.

(A-3) This Court will take judicial notice that the population of Cook County is more than four million people and more than half the population of the State of Illinois.

(A-4) By sovereign acts of legislation, which are shown by this record, the County Board of Cook County, expressly authorized the 818 civil tax litigations which were conducted by petitioner Winston, in courts of record in Cook County, and also authorized said contract of employment, which was made with the express approval in writing by John A. Swanson, then State's Attorney of Cook County.

County proceedings at pages and dates herein mention: 4/27/32 page 1207—12/5/32 page 60, 68—12/12/32 page 74 (Tr. 3ff).

Cummings v. Smith, 368 Ill. 94, 103.

(A-5) Said contract directs and empowers Winston to perform legal services and administrative action at court. That action every attorney and counsellor-at-law is authorized by his license from the Supreme Court of Illinois, to carry on at the request of the client who has control over such litigation. *The preparation and conduct of such litigation at court for Cook County as client*, is not in any sense of the term any act of sovereignty, and does not involve any essential power vested in the State's Attorney of Cook County by the Constitution of Illinois.

Chapter 13, Section 1, Illinois Revised Statutes.
Article 6, Section 22, Constitution of Illinois 1870.
Ottawa Gas Light & Coke Co. v. People, 138 Ill. 336, 343 (1891).

Howard v. Burke, 248 Ill. 224, 228 (1910).

Wilson v. County of Marshall, 257 Ill. App. 220, 223 (1930).

People v. Straus, 266 Ill. App. 95 (1932; Affirmed by *People v. Straus*, 355 Ill. 640 (1934)).

(A-6) The license and franchise held by Winston as an attorney and counsellor at law for more than fifty years, to practice law and thereby to earn a livelihood for himself and family is a vested right which supports his claim for recovery at court.

Nixon v. Herndon, 273 U. S. 536 at 540.

Coleman v. Miller, 307 U. S. 433 at 469.

(B-1) The Statutes of Illinois *pertaining to revenue* for all taxing bodies (Chapter 120 to Illinois Revised Statutes), specifically confirm the power of *the County Board and no one else* to manage and conduct all litigation for collection of *delinquent taxes* by court proceedings.

Illinois Revised Statutes as amended June 17, 1917, Chapter 120, Sections 230 253, 254, 156 to 161, 183, 255, 292 (See Appendix to this petition at page 39 for an example).

Ottawa Gas Light Co. v. People, 138 Ill. 336, 343. Article III, Constitution of Illinois, 1870.

(B-2) The statute is specific that the *County Board* means "The Board of County Commissioners of Cook County," Chapter 120, Section 292.

(B-3) The County Board has control of many funds that are applicable to payment for legal services under this contract, in addition to penalties and taxes exceeding Sixteen Million Dollars, cash funds collected and paid into the County Treasury by efforts of petitioner.

Section 705, Chapter 120, Ill. Rev. Statutes.

People v. Kawoleski, 310 Ill. 498, 501.

Tearney v. Harding, 335 Ill. 123 at 128.

(C-1) No tax statutes which name the State's Attorney as an enforcing officer were ever effective as to this case. The "State's Attorney" was named as enforcing officer in the delinquent Tax Act Laws of 1935, page 1168. All suits and acts by Winston were before that date. And that law was expressly repealed by the present Revenue Law approved May 17, 1939. The "State's Attorney" was named as enforcing officer in the delinquent Tax Act dated July 26, 1939, at Section 6, and also in the delinquent Tax Act July 10, 1941, at Section 6, but these laws are limited

to counties with a population *less than 500,000 people*; they were never applicable to Cook County.

(C-2) The State's Attorney of Cook County is referred to in the County Assessors Act, Laws of May 15, 1933, Section 46. But prior to enactment of Section 1 of act of July 24, 1943, the State's Attorney of Cook County is not mentioned anywhere in the Revenue Act of Illinois. All suits and acts by Winston were *before* any of these dates.

C. C. & N. Co. v. Louisiana, 233 U. S. 362 at 376-378.

(C-3) There was no common law "State's Attorney." There are no common law powers of State's Attorney. The State's Attorney provided for by the Constitution of 1870 of Illinois, was a new office. Constitution does not specify any duties of that office (Tr. 57).

Revised Statutes of Illinois 1845, Chapter 12.

Constitution of Illinois 1870, Article VI, Section 22.

(C-4) Neither the State's Attorney nor any one else has any power whatever to conduct civil litigation about *collection* of delinquent taxes, separate and apart from said specific statutes which vest in the County Board, authority to initiate and conduct all such litigation.

People v. Biggins, 96 Ill. 481 (1880).

Ottawa Gas Light Co. v. People, 138 Ill. 336, 343 (1891).

Wilson v. County of Marshall, 257 Ill. App. 220, 223 (1930).

People v. Straus, 266 Ill. App. (1932); Affirmed by *People v. Straus*, 355 Ill. 640 (1934).

(C-5) Only the County Board may authorize the office or employment of an assistant State's Attorney or

Special Attorney. Only the County Board may provide compensation for such office or employment or personal service.

Dalby v. People, 124 Ill. 66 at 75.

Section 64 Fortieth, Chapter 34; Ill. Rev. Stat.

Section 18, Chapter 53, Illinois Revised Statutes.

Section 24, Article V, Constitution of Illinois.

People v. Hanson, 290 Ill. 370, 373.

Lavin v. Board of Commissioners, 245 Ill. 496, 530ff.

Tearney v. Harding, 335 Ill. 123, 127.

(D-1 The primary duty is obligatory upon all courts, both state and national, to hear and determine assertions upon the Bill of Rights and other constitutional questions and federal questions, which are presented by the record.

Article VI of the Constitution of the United States (Second Paragraph).

West Chicago Street Railway Co. v. Illinois ex rel. Chicago, 201 U. S. 506 at 519-520.

Coombes v. Getz, 285 U. S. 434.

Coleman v. Miller, 307 U. S. 433ff.

D-2) The orders dated September 23rd, 1943, and October 24th, 1934, as adhered to on November 11, 1943, by the Supreme Court of Illinois (tr 79, 159) are now final for purposes of review by this Court.

Georgia Ry. and Power Co. v. Decatur, 262 U. S. 432.

Central Union Telephone Company v. City of Edwardsville, 269 U. S. 190.

C. C. & N. W. Co. v. La., 233 U. S., 362 at 372.)

(D) Said orders are void and outlaw because they seek to destroy contract and property rights of your petitioner

(including his license and franchise as attorney and counsellor at law), which are well pleaded and shown by this record to be vested before this suit was begun by Thomas J. Courtney on July 15, 1933.

People ex rel Eitel v. Lindheimer, 371 Ill. 367, 308 U. S. 505 and 636.

Home Building & Loan Association v. Blaisdell, 290 U. S. 398 at 431.

(E) By decisions of Supreme Court of Illinois, through all the decades prior to the judgment and decree now appealed from, the Constitution and Statutes as to powers of County Board and duties of State's Attorney as to civil litigation, have always sustained the sovereign power and legislative actions of the County Board.

These sovereign acts of legislature have provided for employment of and for payment of County Attorneys, Assistant State's Attorneys' and Special Attorneys, to attend to all manner of litigation authorized by counties in Illinois, independent of any action therein by the State's Attorney of such a County. As a contemporaneous construction, such legislation and administration is binding upon all branches of the government of Illinois.

Cook County Budget for 1931 and prior years.

Ottawa Gas and Light Co. v. People, 138 Ill. 332 343 (1891).

County of Franklin v. Layman, 145 Ill. 138; affirming 43 Ill. App. 163.

Cook County v. Healy, 222 Ill. 310, 317ff (1906).

Howard v. Burke, 248 Ill. 224 at 228 (1910).

Galpin v. City of Chicago, 269 Ill. 27 at 41 (1915).

Tearney v. Harding, 335 Ill. 123 at 127 (1929).

People v. Straus, 266 Ill. App. (1932); Affirmed by *People v. Straus*, 355 Ill. 640 (1934).

(F-1) By contemporaneous construction such legislation and administration is binding in favor of Winston. against all branches of the government of Illinois.

Cook County Budget for 1944 and all prior years.

Nye v. Foreman, 215 Ill. 285 at 288 (1905).

Howard v. Burke, 248 Ill. 224 at 228 (1910).

Anderson National Bank v. Lockett, 64 S. Ct. 599, 651: 321 U. S.

(F-2) And the Legislature of Illinois by Statute in 1912 and re-enactment in 1929 had reaffirmed all that court construction of statute and constitution for years before the Winston contract was made.

Section 18 of Chapter 53 and Section 129 and 179 of Chapter 46, of Illinois Revised Statutes.

(F-3) There is even stronger confirmation and independent continuous assertion by the legislature of Illinois, in its special law for appointments to office by Cook County Commissioners, enacted June 15, 1893 Revised 25, 1913, Chapter 34, Section 64, Fortieth and Forty-third. These laws were re-enacted July 21, 1941 and July 15, 1943, as Sections 64:29 and 52 of Chapter 34 (Smith-Hurd Illinois Annotated Statutes—Pocket part for 1944, page 43.) Continuously since June 15, 1893 this Illinois Statute has provided for “the county attorney, the county architect, the committee clerk of the County Board, the county purchasing agent” and other employees to be appointed by the County Board.

(F-4) Without need to rely upon that statute, the Supreme Court of Illinois ordered the County of Cook to pay the County Architect, as an exercise of County power and duty under Section 7 of Article 10 of Constitution of Illinois 1870.

Hall v. County of Cook, 359 Ill. 528.

(F-5) It is arbitrary denial of equal protection of law, impairment of contract, a taking of vested property by judicial act *ex post facto* without benefit of purchase by eminent domain, and a denial of due process of law, for the Supreme Court and Circuit Court of Illinois, to rule against petitioner whose position is indistinguishable from that of said County Architect.

ARGUMENT FOR PETITIONER

Summary Statement of Facts and Issues.

In order properly to understand the case, this Court should be rather fully advised as to the unusual background of facts out of which the case arose.

The County of Cook is the largest single county and local tax-collecting unit in the United States, since it includes not only the City of Chicago, but also considerable area outside that city, and has a population of over 4 million people. In the years 1931 and 1932, the County (for the reasons hereinafter set forth) had actually become insolvent and was unable for many months to pay the court judges and other officials, and was unable to pay its current debts, and even defaulted on the interest on its municipal bonds. This condition had been brought about by three grave emergencies:

1. The County of Cook and the City of Chicago (like other local governments in the United States) during those years was suffering in their tax revenues from the effects of the great financial depression of that period; and as a result the County (which is the constitutional tax collecting agency for the State and all other local governments within the County, including the City of Chicago) was confronted with a cumulating amount of tax delinquencies both as to real and personal property. These gross delinquencies by the end of the year 1930 had brought the threat of governmental disaster to the County.

2. The Legislature of the State and the State Tax Commission had previously ordered a so-called "Re-assessment" of all real estate tax valuations in the

County of Cook for the year 1927; and this "Re-assessment" had itself greatly increased the temporary insolvency of the County (and all local government units within the County, including the City of Chicago), for the reason that the "Re-assessment" had taken more than 18 months longer to complete, than was contemplated or expected by the taxing authorities of the State and County; as a result of which no real estate taxes whatever were collected in the County during the period that such "Re-assessment" was being spread.

3. After this and during the years 1929 to 1932, it was (and is) a matter of common knowledge in Cook County that a so-called "tax strike" existed in the County whereby a large part of the real estate taxpayers completely refused to pay any taxes whatever until forced to do so by suits instituted for collection thereof, and the liquidation process of courts.

The record shows that as a result of these extraordinary tax conditions, the County and all of the local governments within the County (including the City of Chicago) were faced with bankruptcy; that the interest on their municipal bonds had been defaulted with the result that all of such bonds were badly depreciated on the financial markets, and the fiscal credit of the County and of each of such local governments was, for the time being, totally destroyed; while the thousands of municipal employees of the County and the other local governments were unpaid for months on end, and were for long periods of time continuously faced with what came to be known as "payless pay-days."

The record shows that the County Board of Cook County, under a special provision of the Illinois Constitution, is charged with the duty of "managing the affairs" of Cook County (Const. Art. 10, Sec. 7); and that the Statutes of Illinois make it the sole duty of the said County

Board to enforce the collection of all property taxes, both real and personal, by suits in court if necessary.

The record shows that the County Board, being confronted with the severe tax emergency already indicated, decided to correct that situation as rapidly as possible and for that purpose, as already indicated, entered into a formal contract of record with your petitioner for the collection of such delinquent real estate taxes. That contract was fully considered and long debated by the County Board and was finally authorized and adopted by formal legislative action of the County Board, which incorporated the Contract therein.

In view of its prime importance in this case, this sovereign legislative action of the County (including the Contract in question) is set forth (Tr. 3 ff.) as part of State's Attorney's complaint in the trial court.

The record shows that at the time of such legislative action by the County and the making of that Contract, in the year 1931, the general legal adviser of the County of Cook was the then duly elected and acting State's Attorney of the County, the Honorable John A. Swanson (Tr. 8).

The record shows that for a period of more than 60 years prior thereto, and ever since the adoption of the Illinois Constitution of 1870, *down to the inception of this suit, in July, 1933*, it had been the custom and practice and tradition for the County Board of Cook County to secure the aid and assistance of outside counsel and attorneys in the collection of taxes (in addition to the State's Attorney) whenever the County Board determined that such action was in the public interest. That custom and practice had been specifically approved by at least four prior decisions of the Supreme Court of Illinois: See page 36.

Acting under such custom and practice and tradition, the County Board made the Contract in question and the then State's Attorney of Cook County formally approved the legislative action of the County Board in authorizing the said Contract, and officially approved the Contract so made between the County and your petitioner (Tr. 8).

Your petitioner accepted the said Contract and proceeded to set up a large clerical and auditing force to carry out its provisions. In due course of contract period, petitioner instituted in court and pursued more than 818 separate and important real estate tax suits in the courts of the County and actually collected by force of those suits and paid over to the County treasury a total sum of delinquent taxes amounting to \$16,522,470.81.

Said federal question is stated more factually as follows:

And whether a State Court of Illinois is forbidden by the Constitution to deny the validity of such a contract of public record, between the County of Cook and Edward M. Winston, who is a resident of Illinois and a duly licensed attorney and counsellor-at-law; the terms of which contract authorize and direct said Winston, Attorney, to conduct and control litigation in said courts for the collection of taxes long delinquent in Cook County; his services to be performed under the supervision and management of the Board of Commissioners of said Cook County; the making of which contract of public record was requested and approved in writing at the time of its signing, by the State's Attorney of Cook County then in office.

And whether the State Court in Illinois in denying the validity of such contract, may disregard and overrule its own prior decisions, and may disregard the history and practice as to administration of such matters, and may

repudiate accountings for his fees and outlays made in good faith between said County and Winston, Attorney, and whether said court by downright fiat may refuse compensation to said Winston, Attorney, for his proper services performed and completed, and may refuse to reimburse him for outlays in pursuance of said contract of public record, all of which performance of contract occurred before a later State's Attorney, who is now in office, and relying upon his own official authority, is seeking by this injunction suit to stay further performance under said contract with said County of Cook, by denying compensation to Winston, Attorney, for services rendered in good faith before such adverse intervention; the legal services so completed by Winston having produced substantial returns of tax money (384 Ill. at page 295) to the treasury of said County of Cook and State of Illinois, during the severe financial distress which came to Municipal Corporations in Cook County during the 1930 years of depression.

Your petitioner particularly calls attention to the fact that the County of Cook, under the law, received (as compensation for its services and efforts of tax collection) all the so-called "penalties" collected from taxpayers, being additional sums due after default, which these suits conducted by Winston collected, over and above the taxes originally assessed. And your Petitioner also calls particular attention to the fact that his fees and compensation, under his contract, were not to be paid out of the general funds of the County, but depended entirely on and were to be paid out of such "penalties" as might be collected by him. In other words, the County itself was to make, and did make, a large profit out of the services of your petitioner; and your petitioner's fees were to be paid as a relatively small part of such profit to the County.

Section 705, Chapter 120, Ill. Rev. Stats.

The record in this case shows that the books and records of the County Treasurer showed (and still show) that your petitioner actually collected the sum of \$3,546,-443.70 as "penalties" on delinquent taxes, all of which sum went into the County treasury *as profit* to the County, as a result of the contract with your petitioner.

New State's Attorney.

The record shows that in November, 1932, and about 18 months after your petitioner began work under the said contract, a new and different State's Attorney was elected in Cook County, and that he was of a different political party from his predecessor. And your petitioner charges that the record in this case shows that this case has grown entirely out of that change in the personnel of the office of State's Attorney of Cook County. The same State's Attorney who was elected in November, 1932, is still in office at the time of the filing of this Petition. That State's Attorney, in his own behalf and *in his own name*, began this suit in July, 1933, to have your petitioner's contract with the County declared void and of no avail and to restrain and prevent any payments whatever being made to petitioner under such contract.

All services by petitioner were performed and completed before this suit was led. (See above page 5.)

During said domination by the new State's Attorney the delinquences have grown and now "there are hundreds of millions of dollars of delinquent taxes against property in Cook County." *People v. Courtney*, 380 Ill. 171 at 180.

Your petitioner urges that the Supreme Court of Illinois has denied to your petitioner his constitutional rights, as stated elsewhere in this petition. And your petitioner

contends that the Supreme Court of Illinois has decided this case adversely and contrary to several of the prior and settled decisions of that court itself (as already stated) upon which earlier decisions your petitioner properly relied and the County Board properly relied, in entering into the said contract; and that thereby your petitioner became vested with certain contract rights and property rights in and to the said contract and its avails. And your petitioner therefore says that the Supreme Court of Illinois has illegally and arbitrarily changed its own well-settled construction of the Constitution of Illinois, and of applicable Statutes of Illinois in the premises; and that the said Court has illegally and arbitrarily applied its new ruling in an *ex post facto* and lawless fashion in an attempt by the Court to destroy the vested rights of your petitioner.

Contract rights vested in petitioner under important Illinois Cases which had established settled law of property.

These are cases upon which petitioner and Cook County relied in making contract in suit. They had established a settled rule of property rights in Illinois for 60 years before the contract in suit was made.

Ottawa Gas Light & Coke Co. v. People, 138 Ill. 334 (1891).

This was a tax suit against the Gas Company by the County of La Salle to collect delinquent personal property taxes. The declaration was signed "M. T. Maloney, County Attorney." A motion was interposed in the trial—

"To dismiss the suit because it had been started without authority of law and by an attorney not authorized by law to bring or prosecute the same."

The motion was supported by two affidavits; the first, by one of defendant's counsel, setting out that Maloney was not the State's Attorney of the County and that the records

of the court failed to disclose "any appointment of Maloney to prosecute the case." There was also the supporting affidavit of the State's Attorney of the County, setting up that

"He (the State's Attorney) had neither been requested to prosecute the suit nor had he been sick, absent, or unable to attend the same, nor was he interested in the subject matter of the suit; that the suit was for recovery of a debt due the State of Illinois and La Salle County; but the State's Attorney (in the absence of the disabilities referred to) was alone authorized to prosecute; and that Maloney had no legal authority to institute or prosecute the suit."

There was a counter-affidavit by Maloney, setting up

"That he had been, by resolution of the Board of Supervisors of the County, authorized and directed to begin and prosecute the suit."

The trial court denied the motion to dismiss. A general demurrer was then interposed by the County to the declaration and the demurrer was overruled. Trial was had and judgment entered against the County for \$2,597.00 and costs. On appeal the judgment was reversed by the Supreme Court on the ground of improper admission of evidence; but the Supreme Court specifically held that Maloney could act as counsel for the County in the further prosecution of the case. In so holding, the Supreme Court said:

"It was not error to overrule the motion to dismiss the suit. The attorney who instituted the suit, it was shown, was in that regard acting by the direction and under the authority of the County Board; and the authority of the County Board to institute and prosecute suits for delinquent taxes, whether due upon delinquent lands or personal property, is amply given in Section 230 of the Revenue Law. (See page 39 below.)

"It is contended, however, that while the authority

of the County Board to cause the institution of suits for unpaid taxes is ample, it is not at liberty to select counsel but must act by and through the State's Attorney of the county.' [Citing Chap. 14, Sects. 5 and 6 concerning the powers of the State's Attorney, and discussing them the Court continues:] "It would be perfectly competent for the County Board to direct the State's Attorney to recover delinquent and unpaid taxes and to prosecute the same and in such case it would be his manifest duty to act. * * * We are not disposed, however, to hold that the County Board is, by the statute defining the duties of the State's Attorney, denied the power and authority to select and empower any *competent attorney* to represent the People in beginning and prosecuting suits to recover delinquent taxes." (See Statutes at page 52 below.)

Here we have a specific ruling by the Supreme Court in strong language, refusing the major contention of opposing counsel. The Supreme Court, in conclusion, on this point says:

"We have no doubt that under the general power of the County Board as the fiscal agent of the County it has the inherent right to direct the course of the proceeding [in suits to collect taxes] and to select the persons and agencies through which it will act."

Another important case which is squarely in point is *County of Franklin v. Layman*, 145 Illinois, 138 (1893) Affirming 43 Ill. App. 163; also 34 Ill. App. 606).

This case likewise is so important that it deserves a full analysis. The case was twice before the Appellate Court and was twice tried by the trial court before a jury. The suit was brought by certain attorneys against the county to recover for legal services furnished the county under a special contract. At the end of the first trial a verdict was returned for plaintiffs and judgment entered for \$5367.76.

This judgment was reversed in 34 Ill. App. 606, because of improper instructions given to the jury. On a second trial there was again a verdict for the plaintiffs for the same amount, upon which judgment was entered. The second judgment was affirmed in 43 Ill. App. 163. The Supreme Court, in the case here under discussion, affirmed the Appellate Court on the second appeal.

It appears that prior to 1880 Franklin County had issued \$149,000 of its bonds in aid of a railroad company, \$100,000 of its bonds being based on one Enabling Act of the Legislature, and \$49,000 being based on a different Enabling Act. Some years later questions arose as to the validity of the bonds and the County determined to test their validity in the courts. In pursuance of that determination, the County Board made the special contract and employed the attorneys in the case. By the terms of the contract, the attorneys were

“To commence proper suits and prosecute the same to final determination * * * for a retainer of \$250 and the additional sum of \$8,000 if and when the litigation was finally determined in favor of the County.”

Thereupon there ensued several years of litigation as a result of which the County was successful, first, in defeating the \$49,000 issue of bonds, and later in defeating the \$100,000 issue. At the time of this trial the County had already paid the attorneys for their proportional amount of fees based on the \$49,000 bond issue. After the \$100,000 bond issue had likewise been held invalid the County refused to pay the balance of fees for that service and the suit was brought to recover that proportionate amount of fees. As already stated, the trial court, the Appellate Court, and the Supreme Court, all held that the attorneys were entitled to recover.

In its opinion the Supreme Court said, among other things:

"It is next objected that the County could not lawfully enter into a contract to pay attorney's fees (under the facts of the case) * * * It is broadly conceded that the County had the right to test the validity of its doubtful obligations. But it is said that by the statute [Chap. 34, Sec. 33, concerning the duties of the County Board respecting suits, etc.] the power of the County Board is limited in its employment of counsel to prosecute suits in which the County is a party. We are not disposed to give this section the construction contended for it. * * *

"The County Board is authorized to carry into effect the powers of the County (Chap. 34, Sec. 33) among which is to make all contracts and to do all other acts in relation to the property and concerns of the County necessary in the exercise of its corporate powers. * * *

"We are of the opinion that such proceedings (as the litigation in the case) were within the spirit of the statute and that the *County Board had authority to enter into the said contract.*"

Here again we have a specific holding of the Supreme Court that the State's Attorney is not the exclusive attorney for a county board in civil proceedings; but that where the county board determines it is necessary and desirable so to do, the county may employ outside counsel.

Another interesting case is

Wilson v. County of Marshall, 257 Ill. App. 220 (1930).

In that case the opinion holds that the County Board had power to make a special contract for outside attorneys, even though the State's Attorney had been available and had not been consulted. Justice Jones cites and

relies on the cases of *County of Franklin v. Layman* and *Ottawa Gaslight Company v. The People*, which we have discussed above in detail.

Another important case, which arose in Cook County, is *People v. Straus*, 266 Ill. App. 95; 355 Ill. 640.

(That case in part litigated the very same contract now sued upon by Winstont: See above 5 and Tr. 8).

That was a tax foreclosure suit in the Superior Court where there had been an interlocutory order appointing a receiver of a large apartment hotel. The bill of complaint had been filed in the name of the People and was signed and sworn to by "Henry M. Ashton, their Attorney and Solicitor." Ashton had been appointed attorney for the County Board by a resolution of that Board. The resolution is set out in the opinion. It refers to the non-payment of taxes in the county over a period of years, and the Court takes notice of the recital of the resolution that there had been a vast accumulation of unpaid taxes, "thus creating an emergency situation with reference to the revenue."

It was contended by the defendant that

"As Ashton was neither the State's Attorney nor the Attorney General * * * he had no right or authority to represent the People in the present suit and the resolution of the Board * * * employing him for the purpose therein stated was ultra vires and void."

The opinion in the case is by Judge Gridley and is full and exhaustive. The opinion particularly refers to the case of *Abbott v. County of Adams*, 214 Ill. App. 201, cited and relied on by counsel for respondents in the case at Bar, and says that that opinion "has been overruled." Judge

Gridley, in his opinion, refers to an opinion of the Attorney General (Attorney General's Opinion, 1928, page 240), holding that a County Board had legal authority to employ outside counsel in proceedings for the collection of delinquent taxes. The Attorney General's opinion is discussed at length thereafter. Judge Gridley's opinion concludes on this point:

"In view of the statutes above quoted, the holding in the *Ottawa Gaslight* Case and the resolution of the Board of Commissioners of Cook County, we are of the opinion that the contention of appellants' counsel (that the State's Attorney was the sole lawful counsel of the Board in such matters) is without substantial merit."

The Appellate Court reversed the case, only on the ground that the appointment of a receiver to take charge of and manage the property during foreclosure of the tax lien was illegal.

The case went back for trial on the merits and a decree of foreclosure was entered. The plaintiff later went direct to the Supreme Court and that case is the one now to be discussed.

People v. Straus, 355 Ill. 640 (1934).

This was a writ of error from a decree of foreclosure of a tax lien in which there had been a decree for \$165,-683.99 of back taxes and a sale to the County. In the Supreme Court the County was represented by the State's Attorney, but another law firm had been substituted as associate counsel for the solicitor who had appeared for the County at the trial. In the Supreme Court the defendant again raised the objection that the trial in the County Court had been "improper" because the County had been represented by other counsel than the State's

Attorney. The Supreme Court affirmed the decree below and denied the last mentioned contention, saying on this point:

“Numerous cases are cited tending to show that it was the proper function of the State’s Attorney to prosecute the case, and there is much argument for the purpose of showing that the contract between the County Commissioners and the solicitor who appeared for the People in the trial court was contrary to public policy and void. The particular case relied on in this connection is *Fergus v. Russel*, 270 Ill. 304. That case is not in point here because the employment was directly attacked there and not brought collaterally, as is attempted here. In *Mix v. People*, 116 Ill. 265, we used the following language:

“‘The collection of the public revenue is of the utmost importance and no court should allow a suit of this character to be dismissed because the solicitor who brings it may not happen to be the State’s Attorney or the Attorney General. * * * There is no statute requiring a bill of this kind to be signed in the official character of either of those officers, as there is with reference to an indictment.’

“‘It sufficiently appears that the Board of Commissioners of Cook County authorized the commencement of this suit in the name of the People and that the People ratified the action through a purchase at the foreclosure sale. Having thus authorized, approved and ratified everything that was done, it makes no difference to plaintiff in error whether or not said solicitor was duly authorized to bring this suit.’”

Here again we have the Supreme Court making two significant and important distinctions with respect to the liability of the County in such cases as that now at Bar. In both cases the Supreme Court held that there was a difference between a direct attack on the right of the County Board to enter into a contract for employment of

an attorney (and architect) and a case where a "collateral attack" was made after the employment had been effected and the work was done. In both cases the Supreme Court also held that where the party has accepted the benefit of the contract and the services rendered have been just and profitable to the County, it is then too late to raise even technical objections to the manner in which the contract for the employment has been made. This is an important point in the case at Bar, since it is admitted here that the contract in this case was very profitable to the County and the County was paying for the services out of extra "penalties" which were collected as a result of the tax suits started by the plaintiff as the County attorney.

In this *Straus* case Courtney had defended the right of Ashton to represent the County Board of Cook County.

Hall v. Cook County, 359 Ill. 528 (1935).

In our comment about the *Straus* case in the Superior Court, we referred to the case of *Hall v. Cook County*. The *Straus* case and the *Hall* case both establish the rule of law that the County is in a weaker position in contending that a contract for the employment of services of a professional character is invalid after the contract has been carried out and the County has received the benefit of it, than when a taxpayer's bill is filed to prevent the carrying out of the contract in advance of its execution. The *Hall* case is well known and need hardly be summarized here. The late Mr. Erich Hall, who was County Architect, recovered a judgment for \$137,000 for architect's fees for services rendered in drawing plans for the defunct "Cook County Auditorium" which the County had planned to build and then abandoned. There, as here, the State's Attorney had objected to a recovery because,

as it was contended, the County had no right to make the contract, and furthermore, had not made a prior appropriation for it. In rejecting the County's contention on this point, the Supreme Court said in the *Hall* case:

"The powers of the County are two-fold, viz.: its governmental powers and its business powers. Ordinarily, an estoppel or a waiver cannot be pleaded against a county for its failure to exercise its governmental powers, or the exercise of its governmental powers in an improper manner. This rule is not always true in the exercise of the municipality's business powers. In the cases cited by defendant * * * the assault was made by some taxpayer. * * * The same rule of strict construction should not be applied in behalf of a county where it attempts to take advantage of its own failure properly to exercise its business functions as is involved in behalf of the taxpayer who must pay the tax sought to be levied."

The earliest case which is concerned with the exact point raised by the motion to dismiss in this case seems to be

Mix v. People, 116 Ill. 265 (1886).

In that case the County of Kankakee filed a bill to foreclose a tax lien on some property in which Mix was interested. Foreclosure suit was begun by special counsel employed by the County and not by the State's Attorney. The defendant contended that the County had not authorized the suit and that the solicitor for the County had, therefore, been unauthorized and the suit was unjustified. In rejecting this point the Supreme Court said in the *Mix* case:

"Plaintiffs in error sought * * * to question the authority of complainant's counsel to bring this suit. * * * Counsel for defendants in error have presented no authorities on the subject or referred to any suit bearing upon it. We know, of none, except Chapter

14, Sections 5 and 6, concerning the duties of the State's Attorney to prosecute 'all actions and proceedings for the recovery of its revenues, moneys, fees, benefits and forfeitures accruing to the State or his County.' The collection of the public revenue is of the utmost importance and no court should allow a suit of this character to be dismissed because the solicitor may not happen to be the State's Attorney."

Dalby vs. People, 124 Ill. 66, 75.

"As to the right of recovery for all the taxes, section 230 of the revenue law in its first clause provides that the *county board may institute suit* in an action of debt in the name of the people of the state of Illinois for the whole amount due on forfeited property; or any county, city, town, school-district, or other municipal corporation to which any such tax may be due, may institute suit in an action of debt in its own name for the amount of such tax due any such corporation on forfeited property. The second clause provides that the *county board may also institute suit* in action of debt in the name of the people of the state of Illinois against any person for the recovery of any personal property tax due from such person. Thus it appears that the first clause, with respect to forfeited property, provides that the county board *may sue* for the whole amount of the taxes due on forfeited property, or only for the amount due the county; the suit in the former case to be brought by *the county board in the name of the people*; in the latter case, in the name of the county. The second clause respects personal property tax alone, and provides that the county board may also bring suit in the name of the people for the recovery of any personal property tax due from any person. Any personal property tax due from a person, embraced every personal property tax due from the person. Had the intention been to give to the county board the right of recovery only for the personal property tax due the county, we must think the limitation to the tax

due the county would have been expressly named, and the right of action have been given in the name of the county, as was done in the first clause, in providing for recovery by a county of the amount of the tax due the county on forfeited property. We think, under the section last named, the right of recovery here is for all these personal property taxes due from the defendant; and, when recovered, it will be the duty of the county board to distribute them to the several municipal corporations to which they belong, as would have to be done in the case of a recovery by the county board under the first clause of the section of the whole amount of taxes due on forfeited property.

"The judgment will be affirmed."

Attorney General's Opinion.

We have already referred, in the Appellate Court decision in the *Straus* case, *supra*, to an opinion of the Attorney General of the State on the question here under consideration. In Attorney General's Opinions for year 1928, page 239, the State's Attorney of Alexander County addressed an inquiry to the Attorney General, asking the question—

"The County Board of Commissioners would like to know if they have any authority to employ outside assistance in collecting delinquent taxes."

In answering this question in the affirmative, the Attorney General said:

"In answer to your question, allow me to draw your attention to the following cases (citing *Ottawa Gaslight & Coke Company v. People*, 138 Ill. 336; *Abbott v. County of Adams*, 214 Ill. App. 201; *Stevens v. Henry County*, 218 Ill. 468; *Fergus v. Russel*, 270 Ill. 304; and continuing): An examination of the cases of *Abbott v. County of Adams* (*supra*) and *Stevens v. Henry County* (*supra*) and *Fergus v. Russel* (*supra*) shows that neither of these cases is the same as *Ottawa Gaslight & Coke Company v. People* (*supra*).

Inasmuch as the Supreme Court has not reversed the rule stated in the case of *Ottawa Gaslight Company* (*supra*) it is my opinion that the County Board may employ a competent attorney other than the State's Attorney to represent the People in beginning and prosecuting suits to recover delinquent taxes."

Arbitrary Action Ex Post Facto by the Supreme Court of Illinois.

The Court may observe that the authorities cited in the foregoing opinion of the Attorney General refer to the powers of County Boards generally as provided by the Statutes of Illinois. The County Board of Cook County have, not only these general powers, but also special powers given to it by Act 10, Sec. 7 of the Constitution.

The judgment and opinion by the Supreme Court of Illinois filed on September 23, 1943, now here under review, thereby expressly admits (384 Ill. at page 300) that said judgment order against your petitioner is an arbitrary departure from the established and prior law of the State of Illinois, as announced by the Supreme Court of Illinois. That is an admission that the ruling in this case is *ex post facto* as to the contract and property rights of your petitioner, and that the judgment now under review is a deliberate denial of his constitutional rights stated elsewhere in this petition. That Court said at page 300:

"The statements in those cases which are contrary to the conclusions reached are not adhered to."

Arbitrary Action By State's Attorney.

Every county budget approved by Respondent State's Attorney for 12 years that he has been in office from the year 1933 to the year 1944 inclusive, has provided for the employment of Special Attorneys for the County Board and for various County Officers. This action so approved

by State's Attorney of Cook County, is illustrated by the items from the County Budget of Cook County for the year 1943 which are reproduced below at page 38. It is unconscionable for State's Attorney to contend as he has in this lawsuit, that the County Board has no power to employ Winston, when during the same period and under the same Constitution and Statutes, said State's Attorney has expressly approved such County Budgets. Furthermore, expressly approved such County Budgets and defended this same contract in *Straus v. People* as stated above. Furthermore, it is unconscionable and purely autocratic and a wilful attempt to destroy the property rights of Winston without any process of law, when the conclusion of this lawsuit was delayed for ten years after 1934 when the prior ruling was made by the Supreme Court of Illinois before ruling now adverse to Winston, after Respondent State's Attorney has joined in the contention made in the case of *People v. Straus*, 266 Ill. App. 95, and 355 Ill. 640, which were sustained to the effect that no parties on that record could object to the validity of the employment of Winston as counsel and attorney for Cook County, with reference to delinquent tax proceedings. This shows a deliberate intention by the State's Attorney, to reap for the County the full advantage and effect of the legal services rendered by Winston for the County, before he would bring forward for decision and conclusion the question as to payment of Winston for legal services to Cook County. We submit that is not only unconstitutional and illegal, but it is plainly immoral. That is so stated and established by many decisions of this Court.

Public importance of this case.

This is not a political case. We present for review a breach of basic civil rights fully as much as the recent

Texas case heard in this Court. This case has as wide and public interest and importance, as had the case of *Brand v. Indiana* mentioned above. As shown at pages 36 and 52 of Petition and Tr. 100-137, the County Board continuously and currently ever since the Year 1870 when the Constitution was adopted, has employed and has paid many attorneys for many sorts of legal services entirely outside of the Staff who are permanently employed as full time Assistant State's Attorneys.

Petitioner Winston seeks to recover for private damage caused by infringement upon his franchise to practice law, fully setablished by the Constitution and decision since the year 1870. He urges that the adverse rulings below by the Supreme Court of Illinois, are an arbitrary departure from the meaning and effect of the Statute (Section 13 of Chapter 1 of Ill. Rev. Statutes) and his license and franchise at law, which he has exercised for more than fifty years. And thereby his vested rights are taken away by arbitrary action by Illinois courts.

Not only all Members of the County Board for more than seventy years, but also all such employees for that period, are placed under the cloud of these opinions brought here for review. See Tr. 110.

Furthermore the provisions of Article X, Sec. 7 of the State Constitution are erased altogether, and the future conduct of the County business for more than four million people is directly involved.

Conclusion for Relief.

Your petitioner submits that he did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court and Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioner prays that a rehearing be granted that the order by this Court dated April 24, 1944 be vacated and reversed, and for the allowance of your writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

WEIGHTSTILL WOODS,
Counsel for Petitioner.

Certificate of Counsel to Petition for Rehearing.

Weightstill Woods states that he is counsel of record for Petitioner E. M. Winston: that the foregoing petition for rehearing has been diligently prepared: and is timely presented in good faith and not for delay.

Respectfully submitted,

WEIGHTSTILL WOODS,
Counsel of Record.

Appendix to Petition for Certiorari.

Cook County Appropriation Bill for Year 1943.

Page	Item	Amount
34	1-134 Outside Special Attorneys—for the purpose of employing special counsel and investigators to handle such legal matters as may be assigned by the President or Members of the Board of Commissioners of Cook County	\$ 7,500
53	8-12E Special work on 1943 personal property Assessment including analysis Federal Income Tax Returns and other items)	\$13,410
60	10-134 Outside Special Attorneys	\$10,000
63	11-1 One Attorney	\$ 4,999
77	19-1 One Sheriff's Attorney	\$ 6,499
110	29-1 One Attorney	\$ 3,600
133	40-134 Outside Attorneys	\$50,000

The foregoing kinds of items appear throughout all budget ordinances for all years. Said items are entirely distinct from and outside the provision made for the State's Attorney's Staff at page 85. That staff includes eighty-odd persons as attorneys. Budget Ordinances are Legislation of which all courts take judicial notice by statute (Chapter 51, Section 48a-b, Ill. Rev. Stats.).

Constitution of Illinois Article 5, Section 24:

"Office and employment defined.

"An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency for

a temporary purpose, which ceases when that purpose is accomplished."

Illinois Revised Statutes Chapter 13:

'A license, as provided for herein, shall constitute the person receiving the same, an attorney and counsellor at law, and shall authorize him to appear in all of the courts within this state and there to practice as an attorney and counsellor at law, according to the laws and customs thereof, for and during his good behavior in said practice and to demand and receive fees for any services which he may render as an attorney and counsellor at law in this States.'" (Section 1.)

Illinois Revised Statutes, Chap. 120, as amended June 28, 1917 (see page 26 above):

'*Suit by county for tax on forfeited property. Sec. 230. The county board may, at any time, institute suit in an action of debt in the name of the People of the State of Illinois in any court of competent jurisdiction for the whole amount due for taxes and special assessments on forfeited property; or any county, city, town, school district or other municipal corporation to which any such tax or special assessment may be due, may, at any time, institute suit in an action of debt in its own name, before any court of competent jurisdiction, for the amount of such tax or special assessment due any such corporation on forfeited property, and prosecute the same to final judgment. The county board may also at any time, institute suit in an action of debt in the name of the People of the State of Illinois, in any court of competent jurisdiction, against any person, firm or corporation, for the recovery of any personal property tax due from such person, firm or corporation, and in any such suit for the recovery of personal property tax, the return of the county collector that such taxes are delinquent shall be prima facie evidence that such taxes are due and unpaid but the fact that such taxes are due and unpaid*

may be proven by other competent testimony. This act shall apply to all taxes heretofore levied against any person, firm or corporation and now upon any assessment book or roll, and on the sale of any property following such judgment on execution or otherwise, any *such county*, city, town or school district or other municipal corporation, interested in the collection of said tax, *may become purchaser at such sale of either real or personal property*, and if the property so sold is not redeemed (in case of real estate) *may acquire, hold sell and dispose of the title thereto, the same as individuals may do under the laws of this state*, and in any such suit or trial for forfeited taxes, the fact that real estate or personal property is assessed to a person, firm or corporation shall be prima facie evidence that such person, firm or corporation was the owner thereof, and liable for the taxes for the year or years for which the assessment was made, and such fact may be proved by the introduction in evidence of the proper assessment book or roll, or other competent proof."

By Amendment in 1939, May 17, the only change made was to erase the words "action of debt" and substitute the words 'in a civil action,' and one other similar clause.

